No. 2116

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

CALIFORNIA-ATLANTIC STEAMSHIP COMPANY, a Corporation,

Appellant,

vs.

CENTRAL DOOR & LUMBER COMPANY, a Corporation,

Appellee.

Upon Appeal From the United States District Court for the District of Oregon.

APOSTLES

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vs.

CENTRAL DOOR & LUMBER COMPANY, a Corporation,

NAMES AND ADDRESSES OF PROCTORS ON THIS APPEAL

For the Appellant:

MALARKEY, SEABROOK & STOTT,
Yeon Building, Portland, Oregon.

For the Appellee:

JESSE STEARNS,
JOHN H. HALL,
Railway Exchange Building, Portland, Oregon.

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[Statement of the Clerk of the United States District Court]

In the District Court of the United States for the District of Oregon.

CENTRAL DOOR & LUMBER CO., a Corporation,
Libellant,

vs.

CALIFORNIA-ASIATIC STEAMSHIP CO.,
Respondent.

Be it remembered that on the 5th day of July, 1911, a libel was filed in the District Court of the United States for the District of Oregon, by the Central Door and Lumber Company, libelant, against the California-Asiatic Steamship Company, respondent, and on the said 5th day of July, 1911, a monition was duly issued out of said Court and service thereof duly made, requiring the respondent to appear and answer the libel at the next rule day. That thereafter on the 9th day of August, 1911, a stipulation was filed extending the time of the respondent to answer to and including August 21, 1911; that thereafter on the 27th day of October, 1911, an order adjudging respondent in default was duly entered, and on the 30th day of October 1911, a final decree was entered in said cause. That thereafter on the 1st day of November, 1911, respondent filed a motion to vacate and set aside the decree and for leave to answer in the cause, based upon affidavits therewith filed, and on the

13th day of November, 1911, said motion to vacate was, after argument, denied.

That on the 12th day of December, 1911, said respondent filed in this Court its notice of appeal from the decree of this Court to the United Circuit Court of Appeals, Ninth Circuit, and on the same day filed its undertaking on appeal and for stay of execution, and thereafter on the 22nd day of January, 1912, filed its assignments of error. That on the 22nd day of January, 1912, an order was made and signed in said cause by the Honorable Charles E. Wolverton, District Judge for the District of Oregon, extending time for filing the record on appeal in said cause in the United States Circuit Court of Appeals, Ninth Circuit, to and including the 22nd day of March, 1912.

In testimony whereof I have hereunto set my hand and the seal of said Court, at Portland in said District this 5 day of February, 1912.

A. M. CANNON,

Clerk of the United States District Court, District of Oregon.

In the District Court of the United States for the District of Oregon.

July Term, 1911.

Be it remembered that on the 5 day of July, 1911, there was duly filed in the District Court of the United States for the District of Oregon, a Libel in in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

Libel.

CENTRAL DOOR & LUMBER CO., a Corporation,
Libelant,

vs.

CALIFORNIA-ATLANTIC STEAMSHIP CO, a Corporation,
Respondent.

To Hon. Robert S. Bean and Charles E. Wolverton, Judges of the District Court of the United States, for the District of Oregon.

The libel and complaint of Central Door & Lumber Company, an Oregon Corporation, against California-Atlantic Steamship Company, a foreign Corporation, in a cause of action, civil and maratime of a nature hereinafter more specifically set forth, alleges as follows:

First: At all the times hereinafter mentioned libelant was a corporation, organized and existing under the laws of the State of Oregon, having its principal office and place of business in the City of Portland, in the District and State of Oregon, and was lawfully engaged in the business of buying, selling and dealing in paints, glass, roofing, building paper, building materials, and other goods, wares and merchandise.

Second: At all the times hereinafter mentioned and for a long time previous thereto, Respondent was a Corporation, organized and existing under the

laws of some state or country foreign to Oregon, as to which Libelant is unable to state with more certainty at this time; but J. E. Laidlaw, with an office in the Railway Exchange Building, Portland, Oregon, is its Manager or Agent for the collection of freights, and handling its business and traffic in said port; and Respondent was and is a common carrier, and owned or chartered divers steamships which respondent employed in carrying cargo between Philadelphia and other Atlantic ports, and Portland and other Pacific ports; and among the steamships so owned or chartered by respondent, were the steamships "MILLS" and "STANLEY DOLLAR."

Third: That heretofore on or about the month of December, 1910, pursuant to arrangement theretofore made with respondent, libelant shipped and caused to be shipped in good order and condition, on board the steamship "MILLS", then lying in the port of Philadelphia, and then bound to the Isthmus of Panama. to be transported in said Steamer and connecting lines and steamers to Portland, Oregon, one barrel and two kegs of liquid white paint, sixteen cases of plate glass, 2200 rolls of asphalt roofing, known as Genasco and Phoenix, 800 rolls of deadening felt, known as Atlas Insulating, and 2721 rolls of building paper, known as Sheepskin Sheathing. All of said merchandise was properly packed for carriage and handling, and was duly consigned to libelant at Portland, Oregon, and libelant also directed respondent to insure said shipments for libelant's account.

Fourth: On or about the 22nd day of February, 1910, respondent at Portland, Oregon, notified libelant that said goods and merchandise had arrived by its steamship "STANLEY DOLLAR," and were ready for delivery to said libelant upon payment of charges, including freight advanced to railroads, insurance premiums, and freight earned by respondent, and respondent presented bills for said charges amounting to $1233.81, while said merchandise was still in the hold of the said steamship and before libelant had any opportunity to examine the same and discover its order and condition, and libelant paid respondent said sum of $1233.81, and thereupon respondent delivered said merchandise to libelant in the damaged condition hereinafter stated.

Fifth: Upon unpacking and examining said merchandise, libelant found that all of the building paper had been water soaked, compressed, broken and otherwise damaged, and was thereby made worthless; that all the asphalt roofing had been melted and run by heat, broken and pressed into masses and otherwise damaged, and was thereby rendered worthless; that the glass had been damaged by breakage, a large portion of it being broken into small bits; the barrel and kegs of paint were broken, and the contents had nearly all escaped and wasted, and a large part of the entire shipment was rendered valueless, all owing to the negligence of respondent in stowing and handling said merchandise.

Sixth: The market value of the deadening felt, roofing, building paper and glass of the quantity,

quality and sizes, shipped by libelant and destroyed by the negligence of respondent as aforesaid, at the City of Portland, on the 22nd day of February, 1911, the date of arrival of said merchandise, was $6988.81, including the charges paid to respondent, all of which became and was a total loss to libelant; of all of which respondent had prompt and timely notice. And libelant is entitled to interest on said sum from February 22, 1911.

Seventh: Libelant's loss aforesaid was without fault or negligence on the part of libelant, but was occasioned solely by the negligence and misconduct of the respondent, its employees, agents, or servants in the following particulars, among others:

The asphalt roofing was not properly handled, stowed and carried by respondent, by being placed with the rolls in a perpendicular position and by being kept free from heat, but was so stowed and carried by respondent, its employees, agents, and servants, that it was exposed to heat, and the rolls were piled and packed and carried in a horizontal position, so that the melting and softening of the material, the pressure and weight upon it in the manner that it was stowed and carried compressed it into formless masses, broke the fiber and rendered it useless for any purpose.

The building paper was negligently and improperly stowed, carried and handled by respondent, its employees, agents and servants, whereby it was soaked with water, pressed, broken, and made a pulpy mass, and rendered useless for any purpose.

The glass was improperly stowed, carried and handled by respondent, its employees, agents and servants, whereby it was broken so that out of the entire shipment only 185½ square feet was saved, and this in such small pieces that the value of the salvage was only 40 cents per square foot.

The barrel and kegs of paint were so negligently and improperly stowed, carried and handled by respondent, its employees, agents and servants, that the packages were broken and all but eight gallons of the sixty-two gallons shipped were spilled, wasted and lost.

The respondent neglected to insure said shipment and to deliver insurance policies to libelant; and respondent has failed to collect and pay or cause to be paid any insurance to libelant on account of the said loss and damage, although libelant paid respondent certain sums, for which respondent presented bills, as insurance premiums.

The respondent is chargeable with other faults and negligences, which libelant prays it may be permitted to specify more particularly at the trial hereof.

Eighth: Attached hereto and made a part hereof is a schedule marked "Schedule A," setting forth in detail the kinds, quantities, qualities and market value of the goods shipped by libelant and damaged as aforesaid, and made a total loss by the negligence of respondent, amounting to the sum of$6988.81, as aforesaid, including the freight, insurance and other charges, paid to respondent by libelant, after deducting all allowances for salvage, on the goods shipped.

Ninth: That the respondent is, as heretofore alleged, a foreign Corporation, as libelant is informed and believes, and has property within the jurisdiction of this Honorable Court, to-wit:

A certain Steamship called the "STANLEY DOLLAR," and certain freight moneys earned by the said Steamship.

Tenth: That all and singular the premises are true and within the admirality and maratime jurisdiction of this Honorable Court.

Wherefore, libelant prays that process in due form of law according to the course and practice of this Honorable Court may issue against said respondent, the President, or officers thereof, and that they may be required to answer on oath this Libel and the matters herein contained, and that if said Company cannot be found, then that the goods, chattels, credits and effects thereof within the jurisdiction of this Court may be attached to an amount sufficient to answer the libelant's claim, and that this Honorable Court will be pleased to decree to libelant, the payment of the amount which shall be due unto it for the cause aforesaid and that the respondent may be condemned to pay the same with interest thereon, and the costs of this suit, and that the libelant may have such other and further relief as in law and justice it may be entitled to receive.

CENTRAL DOOR & LUMBER COMPANY,
By ALFRED F. BILES,
President.

United States of America,
District of Oregon,—ss.

Alfred F. Biles, being duly sworn says that he is the President of Central Door & Lumber Company, an Oregon Corporation, the libelant above named; that deponent has read the foregoing Libel, and that the same is true to the best of his knowledge.

Sworn to before me this 5th day of July, 1911.

W. W. WOODCOCK,
Notary Public for Oregon.

[Notarial Seal]

JESSE STEARNS, and
JOHN H. HALL,
Proctors for Libelant.

We manufacture Mirrors Genasco Roofing

CENTRAL DOOR & LUMBER COMPANY

Jobbers of

Plate Glass, Window Glass, Rough Glass, Doors,

Windows, Mouldings, Building Material

Corner Thirteenth and Glisan Sts.

Charge No. Pacific Phone Marshall 1800

Home Phone A 6264

Schedule A.

Portland, Oregon,

Sold to California-Atlantic S. S. Co.,

Bates & Cheeseborough, Agts.

To loss and damage on goods arriving per "STANLEY DOLLAR," Feb. 22, 1911.

1 bbl. Liquid White Paint, 52 gals	$1.75	$ 91.00	
2 kegs Liquid White Paint, 10 gals	1.85	18.50	
		$109.50	
Less Salvage, 8 gals	1.75	14.00	95.50
Shipped by J. W. Masury & Son, New York, N. Y.			
Case No. 8 Plate Glass—total loss, 690¾ ft. 7 to 12 sq. ft.	.50	345.38	
Case No. 18 Plate Glass,—total loss, 448-1-10 ft. 7 to 12 sq. ft.	.50	224.05	
Case No. 24 Plate Glass—27 plts. broken, 190 5-6 sq. ft.	.50	95.40	
Case No. 9, 20 Plates broken, 210¼ sq. ft.	.50	105.12	
Case No. 23, 10 Plates broken, 107 1-3 sq. ft.	.50	53.67	
Case No. 84, 46 Plates broken, 153 1-3 sq. ft.	.35	52.67	
Case No. 5, 8 Plates broken, 82 2-3 sq. ft.	.50	41.33	
Case No. 4, 5 Plates broken, 42¾ sq. ft.	.50	21.38	
Case No. 19, 5 Plates broken, 35 1-6 sq. ft.	.50	17.59	
Case No. 6, 9 Plates broken, 92 5-6 sq. ft.	.50	46.42	
Case No. 7, 7 Plates broken, 67¼ sq. ft.	.50	33.62	
Case No .10, 4 Plates broken, 36 sq. ft.	.50	18.00	
Case No. 12, 8 Plates broken, 43½ sq. ft.	.50	21.75	
Case No. 25, 3 Plates broken, 28 1-3 sq. ft.	.50	14.17	
		$1090.55	
Less Salvage, 185½ sq. ft.	.40	74.20	1016.35
Shipped by Edw. Ford Plate Glass Co., Rossford, O.			
Forward			$1111.85

Sold to California-Atlantic S. S. Co.,
Bates & Cheeseborough, Agts.

Balance Forward			$1111.85
2237 rolls Sheepskin Sheathing—total loss	.54		1207.98
Shipped by L. H. Cheeseman Co., Detroit, Mich.			
471 rolls 1-ply Atlas Insulating Paper, 500 sq. ft, total loss	.99	466.29	
238 rolls 2-ply Atlas Insulating Paper, 500 sq. ft., total loss	1.53	364.14	830.43
Shipped by Keystone Roofing Mfg. Co., York, Pa.			
150 rolls 150 squares ½-ply Genasco Roofing	1.20	180.00	
132 rolls 132 squares 1-ply Genasco Roofing	1.50	198.00	
42 rolls 42 squares 2-ply Genasco Roofing	2.10	88.20	
70 rolls 70 squares 3-ply Genasco Roofing	2.70	189.00	
100 rolls 200 squares ½-ply Genasco Roofing	1.20	240.00	
100 rools 200 squares 1-ply Genasco Roofing	1.50	300.00	
148 rolls 296 squares 2-ply Genasco Roofing	2.10	621.60	
150 rolls 150 squares ½-ply Phoenix Roofing	.95	142.50	
131 rolls 131 squares 1-ply Phoenix Roofing	1.19	155.89	
150 rolls 150 squares 2-ply Phoenix Roofing	1.66	249.00	
98 rolls 98 squares 3-ply Phoenix Roofing	2.14	209.72	
100 rolls 200 squares ½-ply Phoenix Roofing	.95	190.00	
100 rolls 200 squares 1-ply Phoenix Roofing	1.19	238.00	
252 rolls 504 squares 2-ply Phoenix Roofing	1.66	836.64	
			$3838.55
All total loss			$6988.81

Shipped by Barber Asphalt Paving Co., Maurer, N. J.

[Endorsed]: No. 5374. In the U. S. District Court for the District of Oregon. Central Door & Lumber Co., a corporation, vs. California-Atlantic S. S. Co., a corporation. Libel in Personam.

Filed July 5, 1911. A. M. Cannon, Clerk, by G. Clark, deputy. Let Warrant issue, July 5, 1911, Bean, Judge. Jesse Stearns and J. H. Hall, Proctors for Libelant.

And afterwards, to wit, on the 9 day of August, 1911, there was duly filed in said Court a Stipulation in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

CENTRAL DOOR & LUMBER COMPANY, a Corporation,

Libelants,

vs.

CALIFORNIA-ATLANTIC STEAMSHIP COMPANY, a Corporation,

Respondent.

Stipulation.

It is hereby agreed and stipulated by and between the parties to the above entitled suit, appearing by their respective attorneys, that the respondent may have up to and including August 21, 1911, within which to file a further appearance in the above entitled suit, and that an order to that effect be entered herein.

JESSE STEARNS & J. H. HALL,
Proctors for Libelant.

MALARKEY, SEABROOK & STOTT,
Proctors for Respondent.

[Endorsed]: No. 5374. Stipulation extending time within which to appear. Filed August 9, 1911, A. M. Cannon, Clerk U. S. District Court.

And afterwards, to wit, on Wednesday, the 9 day of August, 1911, the same being the 32 Judicial day of the Regular July, 1911, term of said Court; Present, the Honorable Chas. E. Wolverton, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

[Order Enlarging Time for Appearance.]

In the District Court of the United States for the District of Oregon.

No. 5374.

CENTRAL DOOR & LUMBER COMPANY,

vs.

CALIFORNIA-ATLANTIC STEAMSHIP COMPANY,

August 9, 1911.

Now, at this day, based upon the stipulation of the parties filed herein it is ordered that the respondent herein be, and it is hereby, allowed to August 21, 1911, in which to enter its appearance herein.

And afterwards, to wit, on Friday, the 27 day of October, 1911, the same being the 100 Judicial day of the Regular July, 1911, term of said Court; Present: the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

[Order Adjudging Default.]

In the District Court of the United States for the District of Oregon.

No. 5374.

In Admirality.

October 27, 1911.

CENTRAL DOOR & LUMBER CO., a Corporation, Libelant,

vs.

CALIFORNIA-ATLANTIC STEAMSHIP CO., a Corporation, Respondent.

A libel in personam with a clause of foreign attachment having been filed in this cause on the 5th day of July, 1911, and a citation having been duly issued to respondent, directing it to appear and answer unto libelant on the 7th day of August, 1911, and respondent having appeared on the 19th day of July, 1911, and filed its stipulation for cost and its stipulation for value in discharge of the attachment levied on its credits, and having procured further time by stipulation, to and including August 21, 1911, in which to file a further appearance; and the respondent having since neglected and refused to answer the libel, or to further move in the cause, and being now in default,

Now, at this time on motion of Mr. Jesse Stearns, proctor for libelant, it is ordered that the defaults of respondent and its surety, Massachusetts Bonding & Insurance Company be and the same hereby are accordingly entered, and that said respondent and its said surety be condemned to pay the demands of said libelant.

And it is further ordered that libelant appear before the Court and present its proofs on the 30 day of October 1911, at the opening of court on that day.

And afterwards, to wit, on Monday, the 30 day of October, 1911, the same being the 102 Judicial day of the regular July, 1911, term of said Court; Present: the Honorable Robert S. Bean, United States District Judge presiding, the following proceedings were had in said cause,to-wit:

In the District Court of the United States for the District of Oregon.

No. 5374.

Final Decree.

CENTRAL DOOR & LUMBER COMPANY, a Corporation,

Libelant.

vs.

CALIFORNIA-ATLANTIC STEAMSHIP COMPANY, a Corporation,

Respondent.

The defaults of the respondent and its surety, Massachusetts Bonding & Insurance Company, having been heretofore entered, and this cause coming before the Court this day to be heard, now after reading the libel, and hearing the proofs adduced by libelant, and the Court having fully considered the same, now on motion of Jesse Stearns, proctor for libelant, it is

Ordered, Adjudged and Decreed that the libel be and the same hereby is amended to conform to the proof of damage sustained by the libelant, viz: by increasing the amount claimed in the libel to $7288.42 with interest thereon as prayed in said libel.

And the Court having found that the libelant has sustained damages by reason of the negligence of the respondent, in the sum of $7288.42, with interest thereon at six per cent, from February 22, 1911, to the date of this decree, amounting to $291.54, with $136.36 costs, it is further

Ordered, Adjudged and Decreed that the libelant recover herein against said respondent said sum of $7288.42, with $291.54 interest and $136.36 costs, making the total sum of $7716.32. And it is further

Ordered, adjudged and decreed that unless this decree be satisfied, or proceedings thereon be stayed on appeal within the time limited and prescribed by the rules and practice of this Court, the libelant have execution to satisfy this decree; and that the stipulators for costs and value in behalf of respondent cause the engagements of their stipulations to be performed.

R. S. BEAN,
Judge.

[Endorsed]: Central Door & Lumber Co. vs. California, etc., S. S. Co. Decree. Filed Oct. 30, 1911. A. M. Cannon, Clerk.

And afterwards, to wit, on the 26 day of December, 1911, there was duly filed in said Court, a Notice of Appeal in words and figures as follows to wit:

[Notice of Appeal.]

In the District Court of the United States for the District of Oregon.

CENTRAL DOOR & LUMBER COMPANY, a Corporation,

Libelant, and Appellee,

vs.

CALIFORNIA-ATLANTIC STEAMSHIP COMPANY, a Corporation,

Respondent and Appellant.

To CENTRAL DOOR & LUMBER COMPANY, Libelant and Appellee, and to Jesse Stearns and John Hall, Proctors for Libelant:

You and each of you are hereby notified that the respondent above named hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered herein on the 30 day of October, 1911.

MALARKEY, SEABROOK & STOTT,
Proctors for Respondent and Appellant.

District of Oregon,—ss.

Due and legal service of the within Notice of Appeal this 12th day of December, 1911, is hereby admitted.

JESSE STEARNS,
of Proctors for Libelant.

[Endorsed]: No. 5374. In the United States District Court, District of Oregon. Central Door & Lumber Co., a corporation, vs. California-Atlantic S. S. Co., a Corporation. Notice of Appeal. Filed Dec. 26, 1911, A. M. Cannon, Clerk U. S. District Court.

And afterwards, to wit, on the 26 day of December, 1911, there was duly filed in said Court, an order in words and figures as follows, to wit:

[Order Fixing Amount of Supersedeas Bond.]

In the District Court of the United States for the District of Oregon.

CENTRAL DOOR & LUMBER CO., a Corporation,

Libelant,

vs.

CALIFORNIA-ATLANTIC STEAMSHIP CO., a Corporation,

Respondent.

This cause coming on to be heard upon the motion of California-Atlantic Steamship Co., a corporation, Respondent and Appellant, for an order fixing the amount of the bond on its appeal, for the purpose of staying execution of the decree so appealed from;

And it further appearing to the court that the Respondent and Appellant herein has filed a stipulation for costs in the sum of $250;

And it further appearing to the court that the attorneys for Libelant and Appellee have consented and agreed that the bond on said appeal be fixed in the sum of $10,000.00;

It is therefore ordered, adjudged and decreed that upon the filing by the Respondent and Appellant of a good and sufficient bond in the sum of $10,000.00, duly approved by this court and the attorneys for Libelant and Appellee, that the execution on said decree so appealed from be and the same is hereby stayed.

Dated this 23rd day of December, 1911.

R. S. BEAN,
Judge.

[Endorsed]: No. 5374. Central Door & Lumber Co., Libelant, vs. California-Atlantic Steamship Co., Respondent. Order. Filed December 26, 1911, A. M. Cannon, Clerk U. S. District Court.

And afterwards, to wit, on the 26 day of December, 1911,there was duly filed in said Court, an Undertaking on Appeal in words and figures as follows, to wit:

[Undertaking on Appeal.]

In the District Court of the United States for the District of Oregon.

CENTRAL DOOR & LUMBER CO., a Corporation,
Libelant,

vs.

CALIFORNIA-ATLANTIC STEAMSHIP CO., a Corporation,
Respondent.

Whereas, lately in the District Court of the United States for the District of Oregon, in a suit pending in said court between Central Door & Lumber Co., a corporation, Libelant, and California-Atlantic Steamship Co., a corporation, Respondent, a decree was rendered against said California-Atlantic Steamship Co. in favor of Central Door & Lumber Co. in said suit on the 30th day of October, 1911, for the sum of $7,288.42, with $291.54 interest and $136.36 costs, making the total sum $7,716.32; and

Whereas, said California-Atlantic Steamship Co., a corporation, Respondent in the above entitled suit, appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree entered herein on the 30th day of October, 1911; and

Whereas, the Hon. R. S. Bean, Judge of the above entitled court, on the 23rd day of December, 1911, made an order fixing the bond of the appellant in order to stay the execution of said decree in the sum of $10,000.00

Now therefore in consideration of the premises and of said appeal, said California-Atlantic Steamship Co.,

a corporation, as principal, and Massachusetts Bonding and Insurance Company, a corporation, as surety, are bound unto said Central Door & Lumber Company, a corporation, in the sum of $10,000.00;

Now, the condition of the above obligation is such that if the said California-Atlantic Steamship Co. appellant shall abide by and perform whatever decree may be rendered by the United States Circuit Court of Appeals in the cause, or on the mandate of the United States Circuit Court of Appeals by the District Court of the United States for the District of Oregon, then the above obligation to be void, else to remain in full force and virtue.

Signed, Sealed and Delivered this 23rd day of December, 1911.

CALIFORNIA-ATLANTIC STEAMSHIP CO.,
By J. E. LAIDLAW,
Its Attorney in Fact.

MASSACHUSETTS BONDING AND INSURANCE COMPANY,
By WALTER R. ROSSMANN,
Attorney in Fact.

Attest: JAMES D. HART,
Attorney in Fact.

Approved:

JESSE STEARNS,
Of Proctors for Libelant.

Approved Dec. 26, 1911.

R. S. BEAN,
District Judge.

[Endorsed]: No. 5374. Central Door & Lumber Co., Libelant vs. California-Atlantic Steamship Co., Respondent. Undertaking on Appeal. Filed Dec. 26, 1911, A. M. Cannon, Clerk U. S. District Court.

And afterwards, to wit, on the 22 day of January, 1912, there was duly filed in said Court, Assignments of Error in words and figures as follows to wit:

In the District Court of the United States for the District of Oregon.

[Assignments of Error.]

CENTRAL DOOR & LUMBER COMPANY, a Corporation,

Libelant,

vs.

CALIFORNIA-ATLANTIC STEAMSHIP COMPANY, a Corporation,

Respondent.

The California-Atlantic Steamship Company, respondent in the above entitled cause, appealing to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree rendered in this cause by the District Court of the United States for the District of Oregon on the 30th day of October, 1911, files and specifies this, its Assignments of Error on such appeal.

I.

The above entitled court sitting in admirality erred in assuming jurisdiction over and rendering a decree upon a bill of lading providing for a carriage both by navigable water from Philadelphia, Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, and issued upon a single freight consideration for the through carriage from Philadelphia, Pennsylvania, to Portland, Oregon.

II.

The said court erred in rendering a decree for injuries and damage to and loss of the liquid white paint sued for on a carriage by navigable water from Philadelphia, Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, it not appearing that any of said damage to said liquid white paint was inflicted on navigable water or within the jurisdiction of the District Court sitting in admirality, or if part of said liquid white paint was injured on navigable water and part on land, what portion thereof was injured on navigable water.

III.

The said court erred in rendering a decree for injuries and damage to and loss of the plate glass sued for on a carriage by navigable water from Philadelphia, Pensylvania, to Colon, Panama, and by railroad

on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, it not appearing that any of said damage to said plate glass was inflicted on navigable water or within the jurisdiction of the District Court sitting in admirality, or if part of said plate glass was injured on navigable water and part on land, what portion thereof was injured on navigable water.

IV.

The said court erred in rendering a decree for injuries and damage to and loss of the sheepskin sheathing sued for on a carriage by navigable water from Philadelphia, Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, it not appearing that any of said damage to said sheepskin sheathing was inflicted on navigable water or within the jurisdiction of the District Court sitting in admirality, or if part of said sheepskin sheathing was injured on navigable water and part on land, what portion thereof was injured on navigable water.

V.

The said court erred in rendering a decree for injuries and damage to and loss of the Atlas insulating paper sued for on a carriage by navigable water from Philadelphia, Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navi-

gable water from Balboa, Panama, to Portland, Oregon, it not appearing that any of said damage to said Atlas insulating paper was inflicted on navigable water or within the jurisdiction of the District Court sitting in admiralty, or if part of said Atlas insulating paper was injured on navigable water and part on land, what portion thereof was injured on navigable water.

VI.

The said court erred in rendering a decree for injuries and damage to and loss of the asphalt roofing known as Genasco roofing sued for on a carriage by navigable water from Philadelphia, Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portalnd, Oregon, it not appearing that any of said damage to said Genasco roofing was inflicted on navigable water or within the jurisdiction of the District Court sitting in admiralty, or if part of said Genasco roofing was injured on navigable water and part on land, what portion thereof was injured on navigable water.

VII.

The said court erred in rendering a decree for injuries and damage to and loss of the asphalt roofing known as Phoenix roofing sued for on a carriage by navigable water from Philadelphia, Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isth-

mus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, it not appearing that any of said damage to said Phoenix roofing was inflicted on navigable water or within the jurisdiction of the District Court sitting in admirality, or if part of said Phoenix roofing was injured on navigable water and part on land, what portion thereof was injured on navigable water.

VIII.

The said court erred in denying the application of the respondent for an order vacating and setting aside the default decree entered herein, and thereby refusing to permit and allow the respondent to make a defense on the merits.

IX.

The said court erred in assuming jurisdiction of this cause, because it is not within the admirality and maratime or other jurisdiction of said court. It appears in the libel filed in said cause that the contract for the carriage of the goods mentioned in said libel was not a contract of afreightment by navigable water, but was a contract to carry said goods from Philadelphia, Pennsylvania, to Portland, Oregon, made upon a single freight consideration, and contemplated carriage both by navigable water and by land. It is not alleged in said libel that said contract was made upon navigable water; nor is it alleged in said libel that the injuries to the goods for which damages are asked occurred while said goods were on ship board or on navigable water; nor was any proof of-

fered to show that said contract was made upon navigable water or that said injuries were done on shipboard or on navigable water.

X.

The libel in the above entitled cause wholly fails to state facts sufficient to constitute a cause cognizable in the above entitled court sitting in admiralty and said court erred in assuming jurisdiction of said cause.

XI.

Said court erred in rendering any decree in said cause other than a decree dismissing the libel.

XII.

Said court erred in not rendering a decree dismissing the libel herein.

Wherefore appellant and respondent prays that the decree rendered herein be reversed and that said District Court sitting in admirality be directed to render a decree dismissing the libel herein.

MALARKEY, SEABROOK & STOTT,

WILLIAM DENMAN,

Proctors for Appellant and Respondent.

[Endorsed]: No. 5374. Central Door & Lumber Co., Libelant, vs. California-Atlantic Steamship Co., Respondent. Assignments of Error. Filed January 22, 1911, A. M. Cannon, Clerk U. S. District Court.

And afterwards, to wit, on Monday, the 22 day of January, 1912, the same being the 55 Judicial day of the regular November, 1911 term of said Court; Present: the Honorable Chas. E. Wolverton, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Order Extending Time to File Transcript.]

In the District Court of the United States for the District of Oregon.

No. 5374.

January 22, 1912.

CENTRAL DOOR & LUMBER COMPANY, a Corporation,

Libelant.

vs.

CALIFORNIA-ASIATIC STEAMSHIP CO., a Corporation,

Respondant.

Now, at this day, for good cause shown, It is Ordered that the respondent's time for printing the record and filing and docketing this cause in the United States Circuit Court of Appeals, Ninth Circuit, be, and the same is hereby, enlarged and extended to and including the 22nd day of March, 1912.

CHAS. E. WOLVERTON,

Judge.

[Clerk's Certificate to Transcript]

United States of America,

District of Oregon,—ss.

I, A. M. Cannon, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered 1 to 37 inclusive, contain and are a true transcript of the record and proceedings had in said Court in the cause of Central Door and Lumber Company, a corporation, libelant against the California-Asiatic Steamship Company, Respondent, as the same appears of record in said Court and embraces all the proceedings with the exhibits, if any, attached, the final decree, notice of appeal, undertaking on appeal and assignments of error, together with libelants exhibits 1 to 9, inclusive.

I further certify that the cost of preparing, printing and certifying the foregoing transcript is the sum of $_____, which has been paid by the Appellant.

In testimony whereof I have hereunto set my hand and the seal of the said Court at Portland, in said District, this 2nd day of March, 1912.

A. M. CANNON,
Clerk of the United States District Court
for the District of Oregon.

CALIFORNIA-ATLANTIC STEAMSHIP CO.

BATES & CHESEBROUGH

GENERAL AGENTS

418 MERCHANTS EXCHANGE
SAN FRANCISCO

418 MARITIME BLDG.
NEW YORK

AGENTS
PETER WRIGHT & SONS
PHILADELPHIA, PA.
A. G. BATES
BALBOA, C. Z.
A. H. CLEMENT
NEW ORLEANS, LA.

from New York as follows:

29

ALL FREIGHT QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE

CALIFORNIA-ATLANTIC STEAMSHIP CO.

CALIFORNIA-ATLANTIC GULF SERVICE

J. W. CHAPMAN
TRAFFIC MANAGER

BATES & CHESEBROUGH
GENERAL AGENTS

115 MERCHANTS EXCHANGE
SAN FRANCISCO

115 MARITIME BLDG.
NEW YORK

AGENTS
PETER WRIGHT & SONS
PHILADELPHIA PA
A. G. BATES
BALBOA C. Z.
A. H. CLEMENT
NEW ORLEANS, LA
STREET BROS.
CHARLESTON S. C.

SAN FRANCISCO November 19, 1910

A. F. Biles, Esq.,

Pres. Central Door & Lumber Co.,

Portland, Ore.

Dear Sir:

Replying to your lotter of November 9th: We have booked up considerable tonnage of iron and steel for shipment from Philadelphia on our steamer sailing December 21st for Portland and it is our intention to have a steamer make direct connection with this steamer at Panama sailing direct for Portland. We will also take freight for this connection for Portland, which is forwarded from New York on the Panama Line steamers sailing on December 16th and December 22nd. Shipments should arrive at Portland about January 25th.

For shipment on the dates mentioned we will quote you the following rates on your commodities in carload lots, minimum weight 10 tons:

Asphalt Roofing	50¢	Building Paper	50¢
Sheathing Felt	50¢	Window Glass, small sizes	65¢
Plate Glass, small sizes	30¢ per cwt.		

Shipments from Philadelphia should be routed as follows:

from New York as follows:

Macey.
Kingsley.

We would prefer to handle your shipments on our steamer sailing from Philadelphia on December 21st provided they originate in that vicinity.

It is more or less of an experiment on our part, in dispatching this direct steamer to Portland and tho tonnage we receive will govern our actions in the future with respect to the handling of Portland business.

The insurance rate on shipments forwarded on this steamer will be approximately 3/4 of 1% with average insurance.

We will be very glad to have you advise at your earliest convenience if you will make any shipments so that we can arrange to reserve space on our steamer.

Yours very truly,

J. W. Hofman

Trafic Manager.

JWC-D

from New York
Peanut 40 tons
Zinc 5 "
Dead Falls 20 "

65
300
1950.00
2500.00
5000.00
3500.00
12500

from Philadelphia
Roofing 50 tons
N. Glass 100 "
Plate " 50 "
Lt. Glass Prism

White Macey ✓
Cannon ✓
Ford ✓
Barber ✓
Kingsley ✓
~~East Roofing Mfg Co~~
Chesboro — Thatcher Chesboro

[Libilants Exhibit 2]

Nov. 21, 1910

Mr. J. W. Chapman, Traffic Manager,
California-Atlantic S. S. Co.,
San Francisco, Cal.

Dear Sir:—

We have your favor of the 19th and we are arranging to give you 200 to 300 tons, of which approximately 60 tons will be shipped by steamer sailing from New York on December 16th and the balance by steamer leaving Philadelphia December 21st. Duplicate shipping receipts showing values will be sent to Bates & Chesebrough, New York. Please instruct them to insure all shipments for our account.

In addition to the goods mentioned in your quotation, our shipments will include 30 to 50 tons of heavy paints, which we are shipping with the understanding that the 50c rate will apply.

Yours truly,
CENTRAL DOOR & LUMBER COMPANY.
AFB

Filed Oct. 30, 1911,
A. M. CANNON,
Clerk U. S. District Court.

Uniform Bill of Lading Standard form of Straight Bill of Lading approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1908
Adopted 9-08.

The Lake Shore & Michigan Southern Railway Company

STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE

Shippers No.

Agents No.

Charges Advanced:

$

Shipper.

Agent.

Per

Per

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)

31

Form 1970

Uniform Bill of Lading Standard form of Straight Bill of Lading approved by the Interstate Commerce Commission by Order No. 797 of June 27, 1908 Adopted 6-08.

The Lake Shore & Michigan Southern Railway Company

STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE

Shippers No.....

Agents No. ..

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading

at [illegible] 1910

from [illegible]

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from .....

to ..... *is in Cents per 100 Lbs.*

If Class 1st	If 1st Class	If 2d Class	If Rule 25	If 3d Class	If Rule 26	If Rule 28	If 4th Class	If 5th Class	If 6th Class	If Special per.....	If Special per.....

Consigned to [illegible] (Mail Address—Name purposes of Delivery)

Destination [illegible] State of ..... County of .....

Route [illegible] Car Initial [illegible] Car No. 109095

NO. PACKAGES	DESCRIPTION OF ARTICLES AND SPECIAL MARKS	WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
65	State Glass Chas 75710			
	[illegible]			
	[illegible]			
	[illegible]			
	[illegible]			
	[illegible]			
	[illegible]			
	[illegible]			
	[illegible]			
	[illegible]			

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $.....

to apply in prepayment of the charges on the property described hereon.

Agent or Cashier.

Per.....

(The signature here acknowledges only the amount prepaid)

Charges Advanced:

$.....

Per [illegible] Agent.

Per [illegible]

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)

Schedule "A"

CONDITIONS

Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehousemen only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination. If the transportation be from a rail to a water route the liability of [illegible] shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the commodity rate price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or determined by the classification or tariffs upon which the rate is based in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid policies or contracts of insurance.

Sec. 4. All property [illegible] shall be subject to all necessary cooperage and bailing charges. Each carrier over whose route cotton is to be transported hereunder shall have the privilege at its own cost of compressing the same for its convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and mixed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehousemen only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of trucks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

Sec. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions not inconsistent with such statute set forth in this bill of lading and in substitution for the liabilities and conditions of section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters, or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at intermediate ports, to tow and be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors, and the liability for such lighterage shall be governed by the other sections of this instrument.

Sec. 10. Any [illegible] addition or erasure in this bill of lading, which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

Form 1070

Uniform Bill of Lading Standard form of Straight Bill of Lading approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1908 Adopted 6-08.

The Lake Shore & Michigan Southern Railway Company

STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE

Shippers No. .....

Agents No. .....

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading

at Toledo Ohio April 25 19 10,

from Edford Plate Glass Co. the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from .....

to ..... *is in Cents per 100 Lbs.*

If Times 1st	If 1st Class	If 2d Class	If Rule 25	If 3d Class	If Rule 28	If Rule 28	If 4th Class	If 5th Class	If 6th Class	If Special per ..	If Special per ..

Consigned to Central Lbr Lumber Co. (Mail Address—Not for purposes of Delivery.)

Destination, Portland State of Oregon County of .....

Route, Mich Cent & Erie Car Initial MCRX Car No. 51127

Via Ang CN & Erie

NO PACKAGES	DESCRIPTION OF ARTICLES AND SPECIAL MARKS	WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
75	Plate Glass			
	CRT 96 Inches	53750		
	C/C Columbian Atlantic			
	Trans Ohio			
	AF Ft Rich Pkrs Erie			

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Prepaid 15

Collect 1 OK

I ..ived $..... to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per .....

(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

$.....

Edford Plate Glass Co. Shipper.

Per Edward Rose

..... Agent,

Per .....

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)

CONDITIONS

Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in customary weights. No loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if landed) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, to which case the liability shall be the same as if the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

Sec. 2. In consideration of having this company agrees to carry only a reasonable time, and except as otherwise provided by law it is agreed that with respect to that portion of the route beyond the road of the

No carrier shall be liable for loss, damage, or injury not occurring on its own route or in the process of the through route, nor after said property has been delivered to the next carrier, except as such liability may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination, and if such diversion shall be over the route of a rail or water carrier the liability of the carrier issuing this bill of lading shall be the same as though the entire carriage were by it.

The amount of any loss or liability for which any carrier is liable shall be computed on the basis of the value of the property (being the invoice price of any to the consignee, including the freight charges if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon in writing as the released value of the property by the shipper or has been fixed by law or by the tariffs upon which the rate is based, in which events such lower value shall be the maximum amount to which any claim will be settled, whether or not such loss or injury arises from negligence.

Claims for loss, damage, or delay must be made in writing to the carrier at the point of origin or delivery of shipment within four months after the delivery of the property, or in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier liable on account of loss of or damage to any of said property shall have the full benefit of any insurance effected upon or on account of said property, but all settlements between the parties hereto or their respective insurers shall be without prejudice to such insurance.

Sec. 4. All persons entitled to the property shall use all reasonable cooperation and diligence to minimize loss and damage to the property while in transit. Any carrier whose route cotton is to be compressed in transit shall have the privilege at its own cost to compress it, or to have it compressed, to not more than [illegible] pounds per bale, but the carrier shall not make delivery of the property so as to relieve it of liability for loss or damage occurring after the property has left the compress, unless such compression shall have been done at the request of the consignee or owner of the property, or unless such compression was necessary to forward the property to destination, or unless such compression was necessary to avoid increased rates. Any carrier compressing cotton in transit shall use reasonable diligence to preserve identity of bales, but may, in case of deviation or unavoidable delays in procuring such compression, deliver other bales of cotton compressed. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as a warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

Sec. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previously giving full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions prescribed by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and no carrier by water or the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters, or from explosion, bursting of boilers, breaking of shafts, or any latent defect in hull, machinery, or appurtenances; or from collision, fire, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at intermediate ports, to tow and be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall be construed as including lighterage across rivers, other harbors, and the liability for such lighterage shall be governed by the other sections of this instrument.

Sec. 10. Any alteration, addition or erasure in this bill of lading which is not specifically authorized hereon shall be void, and shall not affect the liability of the carriers hereunder, which shall be as if no such alteration, addition or erasure had been made.

31

Uniform B/L of Lading Standard form of Straight Bill of Lading approved by the Interstate Commerce Commission by Order No 787 of June 27

8

Lehigh Valley Railroad Company

STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE.

Shipper's No

Agent's No

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading.

at Maurer, N. J., 12/22/30. 190 FROM Central Door & Lbr Co.,

The rate of freight from to is in cents per 100 pounds

IF Rates 1st	IF 1st Class	IF 2d Class	IF Rule 25	IF 3d Class	IF Rule 26	IF Rule 28	IF 4th Class	IF 5th Class	IF 6th Class	IF Special per	IF Special per

Date, Forwarder—Not for purposes of Delivery

Consigned to Central Door & Lumber Co.,

Destination Portland, Ore. State of County of

Route L.V.-Paid to Port Richmond, Calif. Car Initial Car No.

Atlantic S/S Co.,

NO PACKAGES	DESCRIPTION OF ARTICLES AND SPECIAL MARKS	WEIGHT Subj to Correction	CLASS OR RATE	CHECK COLUMN
	Erie 10075-1,100 Rolls Rfg Paper	63240		
	CRI&P- 58410-1,100 do	65050		
	1 Ex Trimmings			
	Collect			

If charges are to be prepaid, write or stamp here "To be Prepaid."

Received $

to apply in prepayment of the charges on the property described hereon.

Agent or Cashier

Per

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

Charges Advanced

Central Door & Lumber Co.,

Agent Per

FORM AUTHORIZED 1908

[illegible]

Sec. 2. [illegible]

Sec. 3. [illegible]

Sec. 4. [illegible]

Sec. 5. [illegible]

Sec. 6. [illegible]

Sec. 7. [illegible]

Sec. 8. [illegible]

Sec. 9. Except in case of diversion from rail to water route, [illegible]

Sec. 10. [illegible]

F. D 2642

Northern Central Railway Company

STRAIGHT BILL OF LADING—ORIGINAL—NOT NEGOTIABLE.

Shippers No.

Agents No.

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading

at York, Penna. Dec. 14, 1910. 19

from Keystone Roofing Mfg. Co. the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from York Pa.

to Phila Pa. is in Cents per 100 Lbs.

If ... Rates for	If 1st Class	If 2d Class	If Rule 25	If 3d Class	If Rule 26	If Rule 28	If 4th Class	If 5th Class	If 8th Class	If Special per	If Special per
					144						

(Mail Address—Not for purposes of Delivery.)

Consigned to Central Door & Lumber Co.,

Destination, Portland State of Ore County of

California & Phila., Penna.

Route P&R & Atlantic S.S. Co. at Pt. Richmond Initial P R R Car No. 74111

NO. PACKAGES	DESCRIPTION OF ARTICLES AND SPECIAL MARKS	WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN
800	Rolls Building Paper	15, 100		

If charges are to be prepaid, write or stamp here, "To be Prepaid"

Received $ to apply in prepaymbut of the charges on the property described hereon

Agent or Cashier

Per

(The signature here acknowledges only the amount prepaid.)

COLLECT

Value of this shipment is $552.50

Charges Advanced:

$

Keystone Roofing Mfg. Co Shipper.

Per

Per

This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.

CONDITIONS

Sec. 1. The carrier or party in possession of any of the property described shall be liable for any loss thereof or damage thereto or delay except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in cleaning weights. For loss, damage or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of exit (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession and the burden to prove freedom therefrom, such negligence shall be on the carrier or party in possession. The carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shippers the property is transported in open cars, the carrier or party in possession is exempt in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars; shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

Sec. 2. In making this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law, acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable on bonds, damage, or claims not arising on its own road or its portion of the through route, but after said property has been delivered to the next carrier, except such liability as may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any prior or particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of threatened necessity to forward said property by any railroad or route to the point of shipment and the point of destination, but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the lowest market price, if any, at the time and place of shipment under this bill of lading, unless a lower value has been agreed upon or declared in writing by the shipper or has been agreed upon or is declared for the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such compromise, whether or not such loss or damage occurs by negligence).

Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time has elapsed for delivery. Unless otherwise agreed the carrier shall not be liable

Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, and no carrier shall directly or indirectly or by any device, by the payment of premiums or otherwise, seek to avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary cooperage or bailing at owner's cost. Each carrier over whose line property is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. In any bulk consigned for a point where there is a railroad, public, or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and in so delivered shall be subject to a lien for elevage charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's liability as a warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may refuse a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be considered as lessening the time allowed by law or as selling aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when ready for or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after the cars are detached from trains.

Sec. 6. No carrier will receive or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Each party, whether principal or agent, shipping explosives or dangerous goods, without such full and true written disclosure to the carrier or line hauling, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the value before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight chargeable and paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statutes and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no vessel or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters, or from explosions, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances or from collision, stranding, or other accidents of navigation or from prolongation of the voyage. And no vessel owner or any or all of the property herein described shall assume liability for loss of or injury to the property by fire, and vessel owners in distress may be allowed to use for the purpose of raising steam or propelling any portion of said property as fuel without becoming liable for any loss thereby occasioned to the owners thereof. The term "water carriage" in this section shall not be construed as including passenger steamer tickets or bills of lodge or other services, and its liability for such lights are subject to the same conditions as the other sections of this instrument.

Sec. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable as if such alteration had not been made.

Philadelphia 191 No. 13 A

California-Atlantic Steamship Co.
AND
Panama Railroad Co.

BATES & CHESEBROUGH, GENERAL AGENTS
MERCHANTS EXCHANGE, SAN FRANCISCO
MARITIME BUILDING, NEW YORK

PETER WRIGHT & SONS, AGENTS
PHILADELPHIA

MARKS AND NUMBERS

ADD.

Freight from Philadelphia to PORTLAND

120.300 lbs. at $	6.50	$841.50
lbs. at $		$
lbs. at $		$
lbs. at $		$
lbs. at $		$
at $		$
		$ ¢
Insurance Premium AT	5/8 %	$ 19.84
Charges advanced		$ 121.69
Total,		$983.03

Rates, weight and/or measurement subject to corrections.

Received payment

FOR THE COMPANY

(The signature of the Agent here acknowledges only the amount prepaid.)

EXTRACT FROM THE LAWS OF THE UNITED STATES RELATIVE TO PILFERAGE—SECTION 3. And be it further enacted that hereafter all Customhouse Oil of Tar paints, Crude Rubber, Hides and skins, which arrive by vessel from foreign countries, and which are destined to any port or place in the United States, and are entered for consumption therein, and are subject to duty thereon, and all goods which are subject to duty, and which shall arrive by any such vessel, shall be securely packed or put up as hereinafter mentioned, and every person who shall pack or put up, or cause to be packed or put up, any of the articles aforesaid, and which are subject to duty, and which shall be imported into the United States in any such vessel, any Customhouse Oil of Turpentine Oil of Tar and crude rubber, hides and skins, which are subject to duty, and which shall be imported into the United States in any such vessel carrying passengers, shall be deemed guilty of a misdemeanor, and punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding eighteen months, or both.

Received by the **CALIFORNIA-ATLANTIC STEAMSHIP CO.**,
of THE BARBER ASPHALT PAVING Co
under the contract hereinafter contained, the property mentioned below, marked and numbered as per margin, in apparent good order and condition (contents and value unknown,) viz.

TWENTY AND EIGHT (2230) ROLLS ROOFING PAPER
ONE (1) BOX PRINTED MATTER

<NO CORES. ENDS UNPROTECTED. WRAPPERS CHAFED>

Consigned to CENTRAL DOOR & LUMBER Co at PORTLAND O.

to be transported by steamship appointed to sail

or by any other or succeeding steamer or vessel, whether belonging to said corporation or to any other owner, to the PORT OF CRISTOBAL, and there, if that be their destination, to be delivered to consignee or his assigns, if called for by him or them, as in this contract provided, he or they paying freight and charges thereon (unless prepaid), and average, if any; or, if destined beyond to be there delivered to connecting carrier and so on by one connecting carrier to another, until they reach the station, or port nearest to the ultimate destination. If their ultimate destination be beyond the point for any other carrier, to be transported to such ultimate point; and the carrier so selected shall be regarded exclusively as the agent of the owner or consignee.

Each carrier shall be bound (subject to the limitations and exceptions contained in this contract, whether printed or written on the face or back hereof), to deliver said goods in the same order and condition as that in which it received them; and the ultimate carrier to deliver them at its station, anchorage or wharf, in the customary manner to the consignee or his assigns, if called for by him or them, as in this contract provided, he or they paying freight and charges thereon (unless prepaid), and average, if any, according to the York-Antwerp Rules, or at carrier's option, as to matters not therein provided for, according to usages or Port of Loading. If the owner of the ship shall have exercised due diligence to make said ship in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew, in the navigation or management of the ship, or from latent or other defects, or unseworthiness of the ship, whether existing at time of shipment or at the beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in General Average or for any special charges incurred, but, with the ship owner shall contribute in General Average, and shall pay such special charges, as if such danger, damage or disaster, had not resulted from such fault, negligence, latent or other defects or unseworthiness.

It is agreed that said freight, whether prepaid or to be collected, is to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit, and on the happening of any of the herein excepted contingencies, the carriers are to have the right to forward the above-mentioned packages to the ports of destination on their own routes and shall receive extra compensation for such service, whether performed by their own vessels or those of strangers, and in case of salvage services rendered to aforesaid merchandise or treasure, during the voyage, by vessel or vessels of the carriers, such salvage service shall be paid for as fully as if such salving vessel or vessels belonged to strangers.

Every carrier is liable to the preceding carrier for all accrued charges; and in the event of loss of the property after transfer from one carrier to another, the carrier having the property in charge when the loss occurs shall have a lien on the remaining property, if any, for all such advances.

It is mutually agreed that the liability of each carrier, as to goods destined beyond its own route, shall be terminated by proper delivery of them to the next succeeding carrier. This bill of lading is signed for the different carriers who may be engaged in the transportation of the property, not jointly, and each of them is to be bound by and have the benefit of all the conditions thereof as if signed by it, the shipper, owner and consignee. The acceptance of this bill of lading is an agreement on the part of the shipper, owner and consignee of the goods to be bound by all of its stipulations, exceptions and conditions, as fully as if they were all signed by such shipper, owner and consignee. This bill of lading shall have the effect of a special contract not liable to be modified by a receipt from or any act of an intermediate carrier, but subject to all the terms and provisions of, and all the exemptions from liability contained in, the Act of Congress of the United States, approved on the 13th day of February, 1893.

And it is further agreed that after customary notice to the consignee or owner of the arrival of the property described herein at the destination or point of delivery named in this bill of lading, and a reasonable period allowed thereafter for its removal from warehouses or cars, storage charges as usually applicable at such point of delivery may be made and collected on the property remaining undelivered; and such demurrage charges made and collected on loaded cars as the delivering road may have established.

In Witness Whereof, THE bills of lading, all of this tenor and date, have been signed, one whereof being accomplished, the others to stand void.

SHIPPERS ARE REQUESTED TO READ THIS CONTRACT, INCLUDING CONDITIONS ON BACK

For California-Atlantic Steamship Company and Connecting Carriers.

Exhibit #6

Filed [illegible]

CONDITIONS OF THIS BILL OF LADING.

1 The carriers shall have liberty to transfer the goods to and transport them by lighters, barges or any other vessel than that named, to lighter from steamer to steamer, and from steamer to wharf, or to discharge in distress, and shall have liberty to sail without pilots, to tow and assist vessels in any situation, and go to or stop at any port or ports en route, or to call, and to deviate with the privilege to spot. It is agreed that the goods may be lightered from or carted to the consignee or a connecting carrier, in Bay of Panama or elsewhere at the owner's risk. The California Atlantic Steamship Company will not be responsible for loss or damage to goods or treasure from fire or theft, in warehouse, on wharf or in lighters in the Bay of Panama.

2 It is expressly stipulated and agreed that the California Atlantic Steamship Company shall not be liable for destruction of or damage to goods by fire while upon its vessel or at any time during the same thereon, unless such fire is caused by the design or neglect of such company.

3 No carrier or the property of any shall be liable for gold, silver, precious stones or metals, jewelry or treasure of any kind, bank notes, securities, silks, furs, laces, pictures, plate, china, glass or statuary, unless bills of lading are signed therefor in which these articles and value are expressed and extra freight expressed and paid for the assumption of extraordinary risk. See Section 4281 of the Revised Statutes of the United States. Nor for any loss or damage arising from any of the following causes, viz., fire from any cause, on land or on water, jettison, ice, frost, flood, weather, pirates, robbers or thieves, acts of God or of the country's enemies, riots, strikes or stoppage of labor, collisions, explosions, accidents to boilers or machinery or any latent defect in hull, machinery or appurtenances, or unseaworthiness of the ships, even existing at time of shipment or sailing on the voyage, provided the owners have exercised due diligence to make the vessel seaworthy, standing, staining, any accident on or perils of the sea or other waters, or of steam or inland navigation, restraints of government, legal process, claim of ownership by third parties, detention or accidental delay would proper to affect or impair the insufficiency of package in strength or otherwise, rust, dampness, heat, weight, leakage, breakage, sweat, blowing, bursting of casks or packages from weakness or natural causes, evaporation, vermin, frost, heat, marks, contact with or proximity to other goods, natural decay or exposure to weather, or for loss or damage arising from any kind to goods whose bulk or nature requires them to be carried on deck or on open cars, or for the condition of packages or any deficiency in contents there of, if receipted by the consignee as in good order.

4 All bill ings under this bill of lading shall be estimated on the basis of the actual market value of the goods at the place and time of shipment, but the carriers will not in any case be liable for any value exceeding one hundred dollars ($100) upon each package, unless the value over such that amount and is so expressed in this bill of lading in which cases the rate of freight is adjusted.

5 Explosives, inflammable or other dangerous articles may be transported, if the owner chooses, on deck or elsewhere, and may be sold in all cases, by at the owner's risk. If any such article be secretly delivered to the carrier, the shipper shall be responsible for any damage resulting therefrom, and such articles may be destroyed by the carrier without incurring any liability therefor.

6 All articles named in this bill of lading are subject to charges for necessary cooperage and repairs. No liability shall exist for wrong carriage or delivery of goods marked with initials or imperfectly marked, unless notice and address of consignee be given in writing at time of shipment, such marking being agreed to be taken as proof of satisfactory compliance. All claims for damage to goods must be made, and the nature and extent thereof fully described in the presence of the agent of the company having the same taken in custody, before they are removed from the station or wharf. Call's written demand for loss must also be made upon the carrier liable therefor, or upon the carrier which actually delivered the goods, within ten days after delivery, all claims for damages shall be taken to have been waived and no suit shall thereafter be maintainable to recover the same. No agent or employee shall have authority to waive such demand.

7 In case of detention by quarantine, obliging a discharge of the articles named in this bill of lading, all risk and liability of the carrier and its property shall cease and the obligations under this Bill of Lading deemed to have been entirely fulfilled when the articles shall have been thus discharged, and all the risks and expense incurred thereafter shall be on account of shipper, owner and consignee. The several carriers shall have a lien upon the goods specified in this bill of lading for all charges of freight and charges due by the same owners or consignees on other goods in case of loss, detriment or damage to the goods, or delay in the transportation thereof, imposing any liability hereunder, the carrier in whose control such loss occurred at the time of such loss, damage, detriment or delay shall alone be responsible therefor. The receipt of any carrier for the goods shall be prima facie evidence of the condition in which he received them, in a suit against any other carrier.

8 The goods shall be received by the owner or consignee at the station or wharf of the carrier at the ultimate point of delivery, and if not taken away within twenty-four hours after arrival may, at the option of the delivering carrier, be sent to a warehouse to be provided by the shipper, owner or consignee in writing to the final carrier, but at the time at which in ordinary course of transportation the goods should arrive at such point. A failure to direct, or remove the goods within twenty-four hours after their arrival shall in case of any subsequent loss or damage to the same be treated as conclusive proof of negligence on the part of the shipper, owner or consignee which contributed to such loss or injury. No agent or servant of said line as against any carrier under this bill of lading, and no such agent shall exist thereafter without a valid and affirmative proof thereof.

9 The California Atlantic Steamship Company hereby expressly grants the right and option of delivering the merchandise herein described by this Bill of Lading to consignee from alongside or of loading and storing it on the wharf, in lighters, hulks or wharf, or in warehouse immediately upon the arrival of such steamer at the port of discharge and such delivering without notice to or at the expense of consignee, and in the event of its so loading and storing, said steamship and company is thereupon hereby released from all further liability for any damage thereafter, whether arising from fire or from any other cause.

10 If destination is a seaport, the ship may commence discharging, immediately on arrival and discharge continuously, the Collector of the Port through whose district it began a general order for discharge immediately on arrival, and if not completed taken by the consignee within such time as is prescribed by the regulations in force at the time of discharge, they may by the carrier be sent to store provided to law or ordered or returned to the port of shipment, at the owner's risk and risk of the owner thereof, and charges. If the goods are landed at a port where there is no Collector of the delivering carrier, he authorized to deliver to consignee on the authorized representative of either of these at the wharf or store immediately after the arrival of the steamer at the port of destination or the Collector may in his discretion order the goods into hulks, or put in lighters or launches at the cost of the steamer, the expense of the shipper, owner or consignee.

11 In case of the blockade or interdiction of any of the ports of shippers, or of without such blockade or interdiction, the entering of the port should be considered by the Master of safe by reason of disease, war or the disturbances, he is to have the option of forwarding the goods at any other port which he may consider safe, at shipper's expense and risk and in such case the receipt of the Custom House or other port authorities to be accepted by the owners or consignees as final and the right carried out of the terms of this bill of lading.

12 Shippers of the goods named in this bill of lading must comply with all the Consular Regulations for manifests, invoices, certificates, etc., and also have imposed by authorities at port of destination or damage resulting from the failure in this respect or for errors or omissions therein shall be at risk and expense of the consignees of goods and shall be paid by them.

S. M. 59 FOR SAN FRANCISCO AND POINTS BEYOND. (M 5-11

Panama Rail Road Co.

PANAMA RAIL ROAD S. S. LINE.

AND

California-Atlantic S. S. Co.

PIER 67, NORTH RIVER.

FOOT OF WEST 27TH ST.

OFFICE:

24 STATE STREET, NEW YORK.

MARKS AND NUMBERS.

C10 Cidd

Freight from New York to Portland

lbs	at $		$
lbs	at $		$
33990 lbs	at $	.65	$
7040 lbs	at $	.78	$
lbs	at $		$
	at $		$
			$
[illegible]			$
Charges [illegible]			$

[illegible]

[illegible] Rates, weight and/or measurement subject to corrections.

Received Payment FOR THE COMPANY

(Signature of the Agent here acknowledges this the amount prepaid.)

[illegible] ... Oil of Vitriol, Camphene, or other explosive burning fluids and matches ... shipment on board any such vessel, shall be securely packed or put up separately from each other and from all other articles, and the package, box, cask or vessel containing the same shall be distinctly marked on the outside with the name or description of the articles contained therein, and every person who shall pack or put up, or cause to be packed or put up for shipment on board of any such vessel, any Gunpowder, Oil of Vitriol, Camphene or any other explosive burning fluids or materials that ignite by friction, otherwise than aforesaid, or shall ship the same ... and marked as aforesaid, on board any steam vessel carrying passengers, shall be deemed guilty of a misdemeanor and punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding eighteen months, or both. [partly illegible]

New York, December 22, 1910 No. B/L #2

Received by the **PANAMA RAIL ROAD COMPANY,**

of John W. Masury & Sons

under the contract hereinafter contained, the property mentioned below, marked and numbered as per margin, in apparent good order and condition (contents and value unknown,) viz:

Fifteen (15) Bbls Paint
Two Hundred & Thirty two (232) Cs "
One Hundred (100) Kegs "
Twenty five (25) Bbls Zinc
Sixty nine (69) Cs Varnish
Twenty two (22) Frames
Thirty four (34) Cases Adv. Matter

Consigned to Central Door & Lumber Co. Portland Ore.

to be transported by steamship Colon appointed to sail Dec. 22, 1911.

[illegible] by the steamer or succeeding steamer or vessel, whether belonging to said corporation or to any other owner, to the PORT OF CRISTOBAL, and there, if that be their destination, to be delivered to consignee or his assigns, if called for by him or them, as in this contract provided, he or they paying freight and charges thereon (unless prepaid), and average, if any, or, if destined beyond, to be there delivered to connecting carrier and so on by one connecting carrier to another, until they reach the station or port nearest to the ultimate destination. If their ultimate destination be beyond the point for which rates are named, as per margin, they may, by the connecting carrier nearest to such ultimate destination, be delivered to any other carrier, to be transported to such ultimate point, and the carrier so selected shall be regarded exclusively as the agent of the owner or consignee.

Each carrier shall be entitled to all the limitations and exceptions contained in this contract, whether printed or written on the face or back hereof, to deliver said goods in the same order and condition as that in which it received them, and the ultimate carrier to deliver them at its station, anchorage or wharf, in the customary manner to the consignee or his assigns, if called for by him or them, as in this contract provided, he or they paying freight and charges thereon (unless prepaid), and average, if any, according to the York Antwerp Rules, or at carrier's option, as to matters not therein provided for, according to usage of Port of New York. If the owner of the ship shall have exercised due diligence to make the ship in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew, in the navigation or management of the ship, [illegible] or from latent or other defects [illegible] of the ship, whether existing at time of shipment or at the beginning of the voyage, [illegible] not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in General Average or for any special charges incurred, but, with the ship owner, shall contribute in General Average, and shall pay such special charges, as if such danger, damage or disaster, had not resulted from such fault, negligence, latent or other defect, or unseaworthiness.

It is agreed that [illegible] whether prepaid or to be collected, is to be considered as earned [illegible] the goods lost or not lost [illegible] from the happening of any of the herein excepted contingencies, the carriers [illegible] toward the [illegible] of packages to the ports of destination on their own routes and shall [illegible] for such service, whether performed by their own vessels or those of strangers, and in case of [illegible] or treasure during the voyage, by vessel or vessels of the carriers, [illegible] be paid for as fully as if such salving vessel or vessels belonged to strangers.

[illegible] to the proceeds [illegible] for all unpaid charges, and in the event of loss of the property after [illegible] property in charge when the loss occurs shall have [illegible] the remaining property [illegible] for all such advances.

It is mutually agreed that the liability of each carrier, as to goods destined beyond its own route, shall be terminated by proper delivery [illegible] the next succeeding carrier. This bill of lading is signed for the different carriers [illegible] engaged in the [illegible] severally, not jointly, and each of them is to be bound by and have the benefit of all the conditions therein [illegible] the [illegible] and consignee. The acceptance of this bill of lading is an agreement on the part of [illegible] to the acceptance of the goods to be bound by all of its stipulations, exceptions and conditions, as fully as [illegible] all signed by such shipper, owner and consignee. This bill of lading shall have the [illegible] of a special contract [illegible] be a receipt from or any act of an intermediate carrier, but subject to the terms and provisions [illegible] exemptions from liability contained in, the Act of Congress of the United States approved on the [illegible] of February, 1893.

[illegible] after an ordinary notice to the consignee or owner of the arrival of the property described [illegible] of delivery named in this bill of lading, and a reasonable period allowed thereafter [illegible] from [illegible] storage charges as usually applicable at such point of delivery may be imposed [illegible] property [illegible] undelivered, and such demurrage charges made and collected on loaded cars as the [illegible]

In Witness Whereof, 2 bills of lading, all of this tenor and date, have been signed, one whereof being accomplished, the others to stand void.

SHIPPERS ARE REQUESTED TO READ THIS CONTRACT, INCLUDING CONOITIONS ON BACK.

For Panama Rail Road Company and Coonecting Carriers.

[illegible signature]

CONDITIONS OF THIS BILL OF LADING.

1. The carriers shall have liberty to transfer the goods to and transport them by lighters, barges or any other vessel than that named, to lighter from steamer to steamer, and from steamer to shore, or from shore to steamer, and shall have liberty to sail without pilots, to tow and assist vessels in any situation, and to go or stop at any port or ports en route, or beyond, and to deviate, with like privilege to stop. It is agreed that the goods may be lightered, ferried or carried to the consignee or a connecting carrier, in Bay of Panama or elsewhere, at the owner's risk. The Panama Rail Road Company will not be responsible for loss or damage to goods or treasure from fire in cars, in warehouse, on wharf or in lighters in the Bay of Panama.

2. It is expressly stipulated and agreed that the California Atlantic Steamship Company shall not be liable for destruction of or damage to goods by fire while upon its vessel, or before or after loading the same thereon, unless such fire is caused by the design or neglect of said Company.

3. No carrier, or the property of any, shall be liable for gold, silver, precious stones or metals, jewelry, or treasure of any kind, bank notes, securities, silks, furs, laces, pictures, plate, clocks, brass, or stationery, unless specially bought and signed therefor, in which their nature and value are expressed and extra freight aggreed and paid for the assumption of extraordinary risk (see Section 4281 of the Revised Statutes of the United States); nor for any loss or damage arising from any of the following causes, viz: fire from any cause, on land or on water; jettison; explosion; breakage; weather; pirates, robbers or thieves, acts of God or of the country's enemies; riots, strikes or stoppage of labor, collisions, explosions, accidents to boilers or machinery, or any latent defect in hull, machinery or appurtenances, or unseaworthiness of the ship, even existing at time of shipment or sailing on the voyage, providing reasonable care and diligence due diligence to make the vessel seaworthy, stranding, straining, any accident or peril of the sea or other waters, or of steam or inland navigation, restraints of government, legal process, claims of ownership by third parties, detention or accidental delay, want of proper cooperage or packing, insufficiency of package in strength or otherwise, rust, dampness, loss in weight, leakage, breakage, sweat, blowing, bursting of casks or packages from weakness or natural causes, evaporation, vermin, frost, heat, contact with or proximity to other goods, natural decay or exposure to weather; overall, contact with or proximity to other goods whose bulk or nature requires them to be or for loss or damage of any kind on goods whose bulk or nature requires them to be carried on deck or on open cars, or for the condition of packages or any deficiency in the contents thereof, if receipted by the consignee in good order.

4. All liability under this bill of lading shall be estimated on the basis of the actual market value of the goods at the place and time of shipment, but the carriers will not become liable for any value exceeding one hundred dollars ($100) upon each package, unless the value exceeds that amount and is so expressed in this bill of lading, on which basis the rate of freight is adjusted.

5. Explosives, inflammable, or other dangerous articles may be transported, if the carrier chooses, on deck or elsewhere, and they shall, in all cases, be at the owner's risk. If any such article is be secretly delivered to the carrier, the shipper shall be responsible for any damage resulting therefrom, and such articles may be destroyed by the carrier without incurring any liability therefor.

6. All articles named in this bill of lading are subject to charges for necessary cooperage and repairs. No liability shall exist for wrong carriage or delivery of goods marked with initials or imperfectly marked, unless name and address of consignee be given in writing at time of shipment; such marking being agreed to be taken as proof of contributory negligence. All claims for damage to goods must be made, and the nature and extent thereof fully disclosed, in the presence of the agent of the company having the same then in custody, before they are removed from the station or wharf. Unless written demand for damage shall be made upon the carrier liable therefor, or upon the carrier which actually delivered the goods, within ten days after delivery, all claims for damage shall be taken to have been waived and no suit shall thereafter be maintainable to recover the same. No agent or employee shall have authority to waive such demand.

7. In case of detention by quarantine, obliging a discharge of the articles named in this bill of lading, all risk and liability of the carrier and its property shall cease, and the obligations under this bill of lading be deemed to have been entirely fulfilled when the articles shall have been thus discharged, and all the risks and expenses incurred thereafter shall be on account of shipper, owner and consignee. The several carriers shall have a lien upon the goods specified in this bill of lading for all arrearages of freight and charges due by the same owners or consignees on other goods. In case of loss, detriment or damage to the goods, or delay in the transportation thereof, imposing any liability hereunder, the carrier in whose actual custody they were at the time of such loss, damage, detriment or delay, shall alone be responsible therefor. The receipt of any carrier for the goods shall be prima-facie evidence of the condition in which he received them, in a suit against any other carrier.

8. The goods shall be received by the owner or consignee at the station or wharf of the carrier at the ultimate point of delivery, and if not taken away within twenty-four hours after arrival may, at the option of the delivering carrier, be sent to a warehouse or be permitted to lie where landed, all at the expense and risk of the shipper, owner or consignee. If no address of a person at the ultimate point of delivery immediately entitled to such delivery be disclosed by this bill of lading, the same must be furnished by the shipper, owner or consignee, in writing, to the terminal carrier, before the time at which in ordinary course of transportation the goods should arrive at such point. A failure to do this or remove the goods within twenty-four hours after their arrival shall, in case of any subsequent loss of or injury to the latter, be treated as conclusive proof of negligence on the part of the shipper, owner or consignee, which contributed to such loss or injury. Negligence shall not be presumed as against any carrier under this bill of lading, and no liability shall exist therefor without actual and affirmative proof thereof.

9. The California Atlantic Steamship Company is hereby expressly granted the right and option of delivering the merchandise represented by this Bill of Lading to consignee from alongside, or of landing and storing said merchandise in the lighters, hulks or wharf, or in warehouse immediately upon the arrival of said steamer at the port of discharge of said merchandise, without notice to and at the expense of consignee; and in the event of its so landing and storing said merchandise, said Company is thereupon hereby released from all further liability for loss or damage thereafter, whether arising from fire or from any other cause.

10. If destination is a seaport, the ship may commence discharging immediately on arrival and discharge continuously, the Collector of the Port being hereby authorized to grant a general order for discharge, and all goods not entered and passed by the end of such time as is provided by the regulations of the port for the discharge of vessels within such time as is provided by the regulations of the port of discharge, they may by the carrier be sent to store, permitted to lay where landed, or returned to the port of shipment, at the expense and risk of the owner, shipper or consignee. It being expressly understood, however, that the goods may, at the option of the delivering carrier, be delivered to owner, or consignee, or the authorized representative of either of these, at the vessel's tackle, immediately after the arrival of the steamer at the port of destination, or the same may be landed and stored, or stored in hulks, or put in lighters, or launches, to be selected by the master of the steamer, at the expense of the shipper, owner or consignee.

11. In case of the blockade or interdict of the port of delivery, or if, without such blockade or interdict, the entering of the port should be considered by the Master unsafe by reason of disease, war or disturbances, he is to have the option of landing the goods at any other port which he may consider safe, at shipper's expense and risk, and in such case the receipt of the Custom House or other port authorities to be accepted by the owners or consignees as a legal and thorough cancelling of this bill of lading.

12. Shippers of the goods named in this bill of lading must comply with all the Consular Regulations for manifests, invoices, certificates, etc., and any fine imposed by authorities at port of destination, or damage resulting from the failure in this respect, or for errors or omissions therein, shall be at risk and expense of the consignees of goods, and shall be paid by them.

L N 56 FOR SAN FRANCISCO AND POINTS BEYOND. 20M 5-11

Panama Rail Road Co.

PANAMA RAIL ROAD S. S. LINE.

AND

California-Atlantic S. S. Co.

PIER 67, NORTH RIVER.

FOOT OF WEST 27TH ST.

OFFICE:

24 STATE STREET, NEW YORK.

MARKS AND NUMBERS.

As Add

Freight from New York to Portland

.....	lbs. at $	$
53990	lbs. at $	1.65 $
7040	lbs. at $	.75 $
.....	lbs. at $	$
.....	lbs. at $	$
.....	at $	$
		$
Insurance Premium		$
Charges advanced		$
	Total, $	

(☞ Rates, weight and / or measurement subject to corrections.

Received payment: FOR THE COMPANY.

(The signature of the Agent here acknowledges only the amount prepaid.)

Extract from the laws of the United States relating to Stowaways.—Section 5. And be further enacted that hereafter all Gunpowder, Oil of Turpentine, Vitriol, Saltpetre, Fireworks, Phosphorus, or other dangerous goods, shall be marked plainly with the name or names of the article or articles contained therein, on the outside of every package containing the same, and shall be stowed apart from all other articles, and the package, box, cask or vessel containing the same shall be legibly marked on the outside thereof, so as to denote clearly the nature of the article or articles therein contained, under the penalty of forfeiture of the said goods, or the value thereof, to be recovered by the Collector of the District into which the same shall be brought, or put up for shipment on board of any such vessel; and any Gunpowder, Oil of Turpentine, Vitriol, Saltpetre, Fireworks, Phosphorus, or other explosive dangerous article or materials that ignite by friction, otherwise than aforesaid, or shall ship the same, unless packed and marked as aforesaid, shall forfeit and pay for every such offence a sum not exceeding one thousand dollars, or imprisonment not exceeding eighteen months, or both.

New York, December 22, 1911. No. B/L #2

Received by the PANAMA RAIL ROAD COMPANY,

of John W. Maeury & Sons

under the contract hereinafter contained, the property mentioned below, marked and numbered as per margin, in apparent good order and condition (contents and value unknown,) viz.:

Fifteen	(15)	Bbls Paint
Two Hundred + Thirty-two	(232)	Cases "
One Hundred	(100)	Kegs "
Twenty-five	(25)	Bbls Zinc
Sixty-nine	(69)	Cases Varnish
Twenty two	(22)	Frames
Thirty-four	(34)	Cases Adv. Matter

Consigned to Central Door & Lumber Co. Portland, Ores.

to be transported by steamship Colon appointed to sail Dec. 22, 1911.

or by any other or succeeding steamer or vessel, whether belonging to said corporation or to any other owner, to the PORT OF CRISTOBAL, and there, if that be their destination, to be delivered to consignee or his assigns if called for by him or them, as in this contract provided, he or they paying freight and charges thereon (unless prepaid), and average, if any, according to the York-Antwerp Rules, or at carrier's option, as to matters not therein provided for, according to usages of Port of New York. If the owner of the ship shall have exercised due diligence to make said ship in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew, in the navigation or management of the ships or from latent or other defects, or unseaworthiness of the ship, whether existing at time of shipment or at the beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution to General Average or for any special charges incurred, but, with the ship owner, shall contribute in General Average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defects or unseaworthiness.

It is agreed that said freight, whether prepaid or to be collected, is to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit, and on the happening of any of the herein accepted contingencies, the carriers are to have the right to forward the above-mentioned packages to the ports of destination on their own route and shall receive extra compensation for such service, whether performed by their own vessels or those of Strangers, and in case of non-delivery, carriers received no extra compensation for forwarding merchandise by rail or vessel or vessels of the carriers, such salvage service shall be paid for as fully as if such salving vessel or vessels belonged to strangers.

Every carrier is liable to the preceding carrier for all accrued charges, and in the event of loss of the property after transfer from one carrier to another, the carrier having the property in charge when the loss occurs shall have a lien on the remaining property, if any, for all such advances.

It is mutually agreed that the liability of each carrier, as to goods destined beyond its own route, shall be terminated by proper delivery of them to the next succeeding carrier. This bill of lading is signed for the different carriers who may be engaged in the transportation of the shipment, and joinder in and each of them is to be bound by and have the benefit of all the conditions thereof as if signed by it, the shipper, owner and consignee. The acceptance of this bill of lading is an agreement on the part of the shipper, owner and consignee of the goods to be bound by all of its stipulations, exceptions and conditions, as fully as if they were all signed by such shipper, owner and consignee. This bill of lading shall have the effect of a negotiable note not bearing interest, to be paid by receipt from any act of an intermediate carrier, but subject to all the terms and provisions of and all the exemptions from liability contained in, the Act of Congress of the United States, approved on the 13th day of February, 1893.

And it is further agreed that after customary notice to the consignee or owner of the arrival of the property described herein at the destination or point of delivery named in this bill of lading and a reasonable period allowed thereafter for its removal from warehouses or cars, storage charges as usually applicable at such point of delivery may be made and collected on the property remaining undelivered; and such demurrage charges made and collected on loaded cars as the delivering road may have established.

In Witness Whereof, 2 bills of lading, all of this tenor and date, have been signed, one whereof being accomplished, the others to stand void.

SHIPPERS ARE REQUESTED TO READ THIS CONTRACT, INCLUDING CONDITIONS ON BACK.

For Panama Rail Road Company and Connecting Carriers.

W. L. [illegible]

CONDITIONS OF THIS BILL OF LADING.

1. The ... shall have liberty to transfer the goods to and transship the ... Harbors, Bar ... or other vessels than that named ... higher from ... place to ... steamer, and ... liberty to shore, or from shore to steamer, and shall ... liberty to call with ... ports ... and not named, whether in any route named or not named, and at any ... or ports ... or beyond, and to deviate with like privilege ... as ... agree. But the ... shall be lightered, ferried or carried ... at the ... risk ... of the ... parties ... to ... vessels or elsewhere, at the owner risk. The ... Steamship Wood Company ... not be responsible for loss or damage to goods or ... from fire in ... in ... or in ... or in lighters in the Bay of Panama.

2. It is expressly stipulated and agreed that the California Atlantic Steamship Company shall not be liable for detention to or damage to goods by fire while on its vessel, or before or after loading the same thereon, unless such fire ... upon the ... the ... or neglect of said Company.

3. No carrier, or the property of any, shall be liable for gold, silver, precious stones in bullion, jewelry, or treasure of any kind, bank notes, securities, silk ... furs, laces, pictures, plate, china, glass, or statuary, unless bills of lading are signed thereof, in which their nature and value are expressed and extra freight expressed and paid for the assumption of extraordinary risk (see Section 4281 of the Revised Statutes of the United States); nor for any loss or damage arising from any of the following causes, viz.: Fire from any cause, on land or on water, latent ... perishable goods, weather, pirates, robbers or thieves, acts of God or of the ... enemies, riots, strikers or stoppage of labor, collision, explosion, ... order or requirement of any person acting in the ... or ... pretended authority or unseaworthiness of the ship, even existing at time of ... of sailing on the ... voyage, provided ... have exercised due diligence to make the vessel seaworthy ... sailing at and on the ... on or before ... of the same, or other ... or ... of steam ... and ... agents ... aforesaid ... detention, legal process, claims of ownership by third parties, detention or accidental delay, want of proper coverings or packing, insufficiency of packages in strength or otherwise, rust, dampness, loss in weight, leakage, breakage, sweat, blowing, bursting of casks or packages from weakness, ... natural vapor ... evaporation, vermin, frost, heat, smell, contact with or proximity to other goods, natural decay or exposure to weather or loss ... or damage of any kind whatsoever ... those ... in ... requires to be carried on deck or on open cases or for the condition of ... bales or any deficiency in the contents thereof if receipted by the consignee as in good order.

4. All liability under this Bill of lading shall be ... estimated on the basis of the actual market value of the goods at the place and time of ... shipment, ... the carriers will not ... assume liability for any value exceeding one hundred dollars ($100) per ... package, unless the value ... exceeds that amount, and is so expressed in this bill of lading, on which basis the rate of freight is adjusted.

5. Explosives, inflammable, or other ... ous articles may be transported, if the carrier ... knows, on delivery or thereafter, ... any ... to be of ... dangerous ... risk. If any such article be secretly delivered to the carrier, the shipper shall be responsible for any damage resulting therefrom, and such articles may be destroyed by the carrier without incurring any liability therefor.

6. All articles named in this bill of lading are ... at ... shippers for necessary ... conveyance and receipt. No liability shall exist for wrong ... carriage or delivery of goods ... marked with initials or imperfectly marked, unless name and address of consignee be given in writing at time of shipment; such marking being agreed to be taken as proof of contributory ... All claims for damage to goods must be made, and the ... fitting and ... thereof fully ... disclosed, in the presence of the agent of the company having the same then in ... at the time they are ... ed from the station or wharf. Unless written ... and ... for damage shall be made up ... the carrier liable therefor, or upon the carrier which actually delivered the goods, within ten days after delivery, all claims for damage shall be taken to have been ... waived and no suit shall thereafter be maintained to recover the same. No agent or employee shall have authority to waive such demand.

7. In case of detention by quarantine, oblieing a discharge of the articles named in this bill of lading, all risk and liability of the carrier and its property shall cease, and the obligations under this bill of lading be deemed to have been entirely fulfilled when the articles shall have been ... discharged, and all the risks and expenses incurred thereafter shall be on account of shipper, owner and consignee. The several carriers shall have a lien upon the goods specified in this bill of lading for all arrearages of freight and charges due by the same owner or consignee on other goods in case of loss, detriment or damage to the goods, or delay in the transportation thereof, the carrier ... liability hereunder. The carrier in whose actual custody they were at the time of such loss, damage, detriment or delay, shall alone be responsible therefor. The receipt of any carrier for the goods shall be primâ facie evidence of the condition in which he received them, in a suit against any other carrier.

8. The goods shall be received by the owner or consignee at the station or wharf of the carrier at the ultimate point of delivery, and if not taken away within twenty-four hours after arrival may, at the option of the delivering carrier, be sent to a warehouse or be permitted to lie where landed, all at the expense and risk of the shipper, owner or consignee. If no address of a person at the ultimate point of delivery sufficiently entitled to such delivery be disclosed by this bill of lading the same must be furnished by the shipper, owner or consignee, in writing, to the forwarding carrier, before the time at which in ordinary course of transportation the goods should arrive at such point. A failure to do ... or ... remove the goods within twenty-four hours after the arrival shall, in case of any subsequent loss of or injury to the latter, be treated as conclusive proof of negligence on the part of the shipper, owner or consignee, when contributed to such loss or injury. Negligence shall not be presumed as against any carrier under this bill of lading, and no liability shall exist therefor without actual and affirmative proof thereof.

9. The California Atlantic Steamship Company is hereby expressly granted the right and option of delivering the merchandise represented by this bill of lading, at its convenience from alongside, or of landing and storing said merchandise either in lighters, hulks or wharf, or in warehouse immediately upon the arrival of said steamer at the port of discharge of said merchandise, without notice to and at the expense of consignee, and in the event of its so landing and storing said merchandise said Company is thereupon hereby released from all further liability for loss or damage thereafter, whether arising from fire or from any other cause.

10. If destination is a seaport the ship may commence discharging immediately on arrival and discharge continuously, the Collector of the Port being hereby authorized to grant a general order for discharge immediately on arrival, and if the goods be not taken from the ... within the time ... by the ... rules in force at the ... port of discharge, they may by the carrier be sent to store, permitted to lie where landed, or removed to the port of shipment, at the expense and risk of the ... shipper or consignee. It being expressly understood, however, that the goods may, at the option of the ... be delivered to, owner or consignee, or the authorized representative of either of these, at the vessel's tackle, immediately after the arrival of the steamer at the port of destination, or the same may be landed and stored, or stowed in hulks or put in lighters, or launches, to be selected by the master of the steamer, at the expense of the shipper, owner or consignee.

11. In case of the blockade or interdict of the port of delivery, or if, without such blockade or interdict, the entering of the port should be considered by the Master unsafe by reason of disease, war or disturbances, he is to have the option of landing the goods at any other port which he may consider safe, at shipper's expense and risk and in such case the receipt of the Custom House or other port authorities to be accepted by the owners or consignees as a legal and through cancelling of this bill of lading.

12. Shippers of the goods named in this bill of lading must comply with all the Consular Regulations ... manifests, invoices, certificates, etc.; and any fine imposed by authorities at port of destination, or damage resulting from the failure in this respect or, for errors or omissions therein, shall be at risk and expense of the consignees of goods, and shall be paid by them.

ALL FREIGHT QUOTATIONS SUBJECT TO CHANGE WITHOUT NOTICE

CALIFORNIA-ATLANTIC STEAMSHIP CO.

BATES & CHESEBROUGH

GENERAL AGENTS

418 MERCHANTS EXCHANGE
SAN FRANCISCO

408 PACIFIC ELECTRIC BLDG.
LOS ANGELES

BALBOA, C. Z.

419 MARITIME BLDG
NEW YORK

611 THE BOURSE
PHILADELPHIA

[illegible] GRAVIER ST
NEW ORLEANS

J. W. CHAPMAN
TRAFFIC MANAGER

3

Portland, Oregon 14th. March, 1911

Messrs. Central Door & Lumber Co.

City.

Dear Sirs:-

I am in receipt of your claims #2252, 253, 2254, 2255, all of which have had my attention and have been forwarded to Messrs. Bates & Chesebrough in San Francisco.

Please note that our office address is 320 Lumbermens Building as it was owing to the fact that your communication went to my residence that it was overlooked and not sooner acknowledged.

Apologizing for the oversight,

I am

Yours very truly

[signature]
Traffic Mgr.

Kindly send us at your convenience certified copy of each invoice for our claim file.

Libelants Exhibit-8

[illegible]

[**Libilants Exhibit 9**]

March 16, 1911

California-Atlantic S. S. Co.,
620 Lumbermen's Bldg.,
City.

Gentlemen:—

We have your favor of the 14th and enclose, as requested, certified copies of original invoices covering shipments on which we have put in damage claims.

Yours truly,
CENTRAL DOOR & LUMBER COMPANY.

Enc.
AFB

Filed Oct. 30, 1911,
A. M. CANNON,
Clerk U. S. District Court.

[Certificate of Clerk U. S. District Court to Exhibits.]

In the United States Circuit Court of Appeals, Ninth Circuit.

CALIFORNIA-ATLANTIC STEAMSHIP COMPANY, a Corporation,

Appellant,

vs.

CENTRAL DOOR & LUMBER COMPANY, a Corporation,

Appellee.

United States of America,
District of Oregon,—ss.

I, A. M. Cannon, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that libelant's exhibits numbered one to nine, inclusive, and shown on pages 29 to 37, inclusive, of the Apostles on Appeal, and referred to in my certificate to the Transcript on Appeal appearing on page 28 of the Apostles on Appeal, in the above-entitled cause, are full, true and correct copies of the originals thereof, and that the said originals were offered in proof by libelant and admitted in evidence by the Court at the hearing of the above-entitled cause on the thirtieth day of October, nineteen hundred and eleven.

A. M. CANNON,
Clerk of the United States District Court for the District of Oregon.

[Endorsed]: No. 2116. In the United States Circuit Court of Appeals, for the Ninth Circuit. California-Atlantic Steamship Company, a Corporation, Appellant, vs. Central Door & Lumber Co., Appellee. Additional Certificate of Clerk. Filed May 20, 1912. F. D. Monckton, Clerk.

IN THE

United States Circuit Court of Appeals

NINTH DISTRICT

CALIFORNIA-ATLANTIC STEAMSHIP COMPANY,
A CORPORATION,
Appellant,

vs.

CENTRAL DOOR AND LUMBER COMPANY,
A CORPORATION,
Appellee.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Oregon

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STATEMENT.

On July 5, 1911, the Appellee filed in the District Court a libel against the Appellant and attached the Steamship "STANLEY DOLLAR," the property of Appellant, seeking compensation for injuries and damage to a certain consignment of goods and wares shipped under contracts of affreightment with Appellant.

The libel alleges that these goods and wares were shipped in good condition by libelant on board the Steamship "MILLS," then lying in the Port of Philadelphia and then bound to the Isthmus of Panama, to be transported in said steamer **and connecting lines** and steamers to Portland, Oregon. It is further alleged that after delivery of these goods and wares at Portland, Oregon, it was discovered they were damaged and injured, all owing to the alleged negligence of respondent in stowing and handling the same.

It appears from the face of the libel and from the testimony received in evidence that the goods in question were shipped to be transported partly by navigable waters and partly by land. Some of the goods originated at Toledo, Ohio; some, at York, Pennsylvania, and the rest at Philadelphia. Those originating elsewhere than Philadelphia were shipped by railroad to Philadelphia; the entire consignment was then loaded on board the steamship "Mills" and was transported to Colon, Panama, and there unloaded from the "Mills" and stowed and loaded upon cars of the Panama Railroad Company and carried across the Isthmus of Panama to Balboa on land by railroad; and then loaded upon the steamship "Stanley Dollar" and transported thence to Portland, Oregon.

There is no allegation in the libel to the effect that the goods were damaged and injured while on board either the "Mills" or the "Stanley Dollar" and they

may have been and very likely were damaged and injured while crossing the Isthmus on land.

The facts relative to the respondent's defense to this libel necessarily were to be procured from Philadelphia, Colon and Balboa, and would require some time to obtain. The respondent appeared, filed a stipulation and bond and released the attached property and procured from libelant's attorney a stipulation for time in which to answer. About the time of the expiration of this stipulation counsel for respondent met counsel for libelant and explained that he needed further time because he had not yet received the facts necessary to frame an answer and counsel for libelant informed respondent's counsel that no default would be taken without prior notice. Relying upon this assurance counsel for respondent filed no dilatory plea and did not apply to the Court for further time. Without notice of any kind counsel for libelant on October 27, 1911, appeared before the Court and took a default against respondent and on October 30, 1911, without notice to respondent and during its absence, offered proof, and a decree was then entered. This action was not discovered by respondent until a day or so later and a motion was made, supported by affidavits, for the setting aside of the default. The District Judge held, however, that by rule of Court stipulations of counsel would be disregarded unless in writing, and refused to set aside the default, and thus libelant has procured an advantage it should not have. Respondent has a good and meritorious de-

fense which it intended and desired to interpose, but, on account of the actions aforesaid, respondent is reduced to presenting this matter on appeal upon an exception to the jurisdiction of the District Court in admiralty.

We have made the foregoing explanation so that this Court may understand that it was not for want of a meritorious defense that the default was entered and that respondent is here now challenging the jurisdiction of the Court. Respondent wants an opportunity to present its defense upon the merits and, if it can compel libelant to amend its libel, that result can be accomplished.

Upon the record as it stands appellant contends that the Admiralty Court has no jurisdiction because it does not appear from the libel that the alleged negligence or breach of contract or resulting damage to the goods occurred on navigable waters and did not occur on land while crossing the Isthmus of Panama and it does appear that so much of the contract of affreightment which was to be performed in crossing the Isthmus of Panama was to be performed by "connecting lines" and is not a maritime contract.

The respondent has assigned and does assign as errors committed by the Court and apparent on the face of the record, the following, to-wit:

I.

The District Court sitting in admiralty erred in as-

suming jurisdiction over and rendering a decree upon a bill of lading providing for a carriage both by navigable waters from Philadelphia, Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, and issued upon a single freight consideration for the through carriage from Philadelphia, Pennsylvania, to Portland, Oregon.

II.

The said Court erred in rendering a decree for injuries and damage to and loss of the liquid white paint sued for on a carriage by navigable water from Philadelphia, Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, it not appearing that any of said damage to said liquid white paint was inflicted on navigable water or within the jurisdiction of the District Court sitting in admiralty, or if part of said liquid white paint was injured on navigable water and part on land, what portion thereof was injured on navigable water.

III.

The said Court erred in rendering a decree for injuries and damage to and loss of the plate glass sued for on a carriage by navigable water from Philadelphia,

Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, it not appearing that any of said damage to said plate glass was inflicted on navigable water or within the jurisdiction of the District Court sitting in admiralty, or if part of said plate glass was injured on navigable water and part on land, what portion thereof was injured on navigable water.

IV.

The said Court erred in rendering a decree for injuries and damage to and loss of the sheepskin sheathing sued for on a carriage by navigable water from Philadelphia, Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, it not apearing that any of said damage to said sheepskin sheathing was inflicted on navigable water or within the jurisdiction of the District Court sitting in admiralty, or if part of said sheepskin sheathing was injured on navigable water and part on land, what portion thereof was injured on navigable water.

V.

The said Court erred in rendering a decree for injuries and damage to and loss of the Atlas insulating paper sued for on a carriage by navigable water from

Philadelphia, Pennsylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, it not appearing that any of said damage to said Atlas insulating paper was inflicted on navigable water or within the jurisdiction of the District Court sitting in admiralty, or if part of said Atlas insulating paper was injured on navigable water and part on land, what portion thereof was injured on navigable water.

VI.

The said Court erred in rendering a decree for injuries and damage to and loss of the asphalt roofing known as Genasco roofing sued for on a carriage by navigable water from Philadelphia, Pennsylvania, to Colon, Panama, and by railroad from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, it not appearing that any of said damage to said Genasco roofing was inflicted on navigable water or within the jurisdiction of the District Court sitting in admiralty, or if part of said Genasco roofing was injured on navigable water and part on land, what portion thereof was injured on navigable water.

VII.

The said Court erred in rendering a decree for injuries and damage to and loss of the asphalt roofing

known as Phoenix roofing sued for on a carriage by navigable water from Philadelphia, Pensylvania, to Colon, Panama, and by railroad on land from Colon, Panama, to Balboa, Panama, across the Isthmus of Panama, and by navigable water from Balboa, Panama, to Portland, Oregon, it not appearing that any of said damage to said Phoenix roofing was inflicted on navigable water or within the jurisdiction of the District Court sitting in admiralty, or if part of said Phoenix roofing was injured on navigable water and part on land, what portion thereof was injured on navigable water.

VIII.

The said Court erred in denying the aplication of the respondent for an order vacating and setting aside the default decree entered herein, and thereby refusing to permit and allow the respondent to make a defense on the merits.

IX.

The said Court erred in assuming jurisdiction of this cause, because it is not within the admiralty and maritime or other jurisdiction of said Court. It appears in the libel filed in said cause that the contract for the carriage of the goods mentioned in said libel was not a contract of affreightment by navigable water, but was a contract to carry said goods from Philadelphia, Pennsylvania, to Portland, Oregon, made upon a single freight consideration, and contemplated carriage both by navigable water and by land. It is not alleged in

said libel that said contract was made upon navigable water; nor is it alleged in said libel that the injuries to the goods for which damages are asked occurred while said goods were on shipboard or on navigable water; nor was any proof offered to show that said contract was made upon navigable water or that said injuries were done on shipboard or on navigable water.

X.

The libel in the above entitled cause wholly fails to state facts sufficient to constitute a cause cognizable in the above entitled court sitting in admiralty and said Court erred in assuming jurisdiction of said cause.

XI.

Said Court erred in rendering any decree in said cause other than a decree dismissing the libel.

XII.

Said Court erred in not rendering a decree dismissing the libel herein.

POINTS AND AUTHORITIES.

I.

The libel is founded upon tort and not on breach of contract.

The Quickstep, 9 Wall, 670.

Nelson v. Great Northern R. R., 72 Pac., 642.

Parrill v. Cleveland Co., 55 N. E., 1026.

Whittington v. Memphis Co., 21 Fed., 896.

The John G. Stevens, 18 Sup. Ct. Rep., 549.

II.

Admiralty will not take jurisdiction of an action to recover damages for a tort unless it appears from the libel that the damage, resulting from the wrong or negligence complained of, occurred on navigable water and not on land.

The Plymouth, 3 Wall, 20.

The Rock Island Bridge, 6 Wall, 213.

The Steamboat Commerce, 1 Black, 574.

The Belfast, 7 Wall, 624.

The Steamboat New World, 16 How. 469.

Johnson v. Chicago Co., 119 U. S., 397.

Ex Parte Phenix Co., 118 U. S. 610.

The Mary Garrett, 63 Fed. 101.

The Mary Stewart, 10 Fed. 137.

Hermann v. Port Blakely Co., 69 Fed., 646.

III.

Admiralty will not take jurisdiction of a contract of affreightment, which is to be performed partly on land and partly on water, unless it appears that the damage or loss, for which recovery is sought, occurred during the performance of that part of the contract which was to be performed on the water.

Pacific Coast S. S. Co. v. Ferguson, 76 Fed. 993.

Pacific Coast S. S. Co. v. Moore, 70 Fed. 870.

The Richard Winslow, 67 Fed. 259, affirmed in 71 Fed. 426.

Phoenix Insurance Co. v. Erie Co., Fed. Cas. 11112.

Jones v. Massachusetts, Fed. Cas. 7480.

The Pennsylvania, 154 Fed. 9.

The Pulaski, 33 Fed. 383.

The James T. Furber, 157 Feb. 126.

Turner v. Beacham, Fed. Cas. 14252.

IV.

Facts necessary to sustain admiralty jurisdiction must appear in the libel, the Court cannot presume them.

Peyroux v. Howard, 7 Pet. 341.

V.

Admiralty jurisdiction cannot be acquired by consent or waiver, but only by the necessary jurisdictional facts appearing in the libel.

The Oceano, 148 Fed. 131.

VI.

A contract or agreement to **procure** insurance in a shipment of goods by sea is not a maritime contract and not congnizable in admiralty.

Marquard v. French, 53 Fed. 603.

The City of Clarksville, 94 Fed. 201.

VII.

A bill of lading contains a contract binding upon the consignor and consignee as well as the carrier.

The Henry B. Hyde, 82 Fed. 681.

ARGUMENT.

Our attack on the jurisdiction of the Court is based upon the absence from the libel of any allegation as to where the negligence and resulting damage to the goods occurred. Our proposition, briefly stated, is that it must appear from the libel that the damage to the goods occurred during that part of the transportation which took place upon navigable water, and this is true whether the form of the suit is ex contractu or in tort. If it is based upon tort, then it is the location of the happening of the resulting damages on navigable waters that gives admiralty jurisdiction of the tort. If it is based upon breach of contract, it must appear that the contract breached was a maritime contract, before admiralty will take jurisdiction. For all the libel shows the acts of negligence complained of and the resulting damages may have occurred on the land during that part of the transportation which was on the railroad across the Isthmus of Panama. And we shall assume that it did occur there, because the libel fails to allege that it occurred on navigable waters.

We contend that this is fatal to admiralty jurisdiction, because admiralty has no jurisdiction of a tort occurring on the land, and a contract of transportation to be performed on the land is not maritime in its nature and a breach of that part of the contract of affreightment, which was to be performed on the Isthmus of Panama is not cognizable in admiralty.

In discussing the propositions we have made we

shall first consider the libel as founded in tort and give our views as to why it should be so considered; and then consider the matter from the viewpoint that the libel is based upon a breach of contract.

This suit is based upon tort, and admiralty has no jurisdiction of it.

In this class of cases it is difficult sometimes to determine whether the recovery sought is for tort or breach of contract. The same acts may be breach of contract and tort at the same time. In a contract of affreightment is implied the duty of safely carrying the goods shipped. By virtue of the character of respondent as a common carrier the law imposes upon it the same duty of safe carriage. So that any act of negligence on the part of respondent whereby the goods are injured during the carriage is at once a breach of the contract and at the same time a violation of the duty imposed by law, i. e., a tort.

The libelant here had the right to. bring its suit upon either theory; for a breach of the contract, or for violation of the legal duty. And which theory it has elected to pursue must be determined from the libel and the special circumstances of the case.

It appears that there were special contracts entered into in this case evidenced by the bills of lading offered in testimony at the hearing. And it appears from these

special contracts that the liability of respondent was limited in several material particulars. In the first place there is no liability upon respondent for breakage, for leakage, or for the effects of heat; nor is there any liability unless a written demand for damages be served upon respondent within ten days of the delivery of the shipment; nor is there any liability upon respondent for damages occurring while the goods were in the custody of connecting carriers. These provisions are contained in the contracts,—the bills of lading,—made a part of the case by libelant's proof at the hearing, and we refer to them here in order to show that libelant has not undertaken to declare upon them. There is no allegation of their existence or of compliance with their terms by libelant. Furthermore it appears there could be no recovery upon the special contracts because the libel shows that the injuries to the goods are of the very character which are exempted by the special contracts, i. e., breakage, leakage and the effects of heat. Neither does the libel undertake to declare upon an implied contract of carriage arising from the payment of consideration and promise to perform for the reason that no promise is alleged and in fact an express contract is averred. The libel alleges in paragraph third that the shipment was made pursuant to arrangements previously made with respondent. These arrangements, while not specifically alleged, appear from the testimony to be those contained in the bills of lading. No allegation is made

that libelant has performed the conditions of those arrangements on its part to be performed.

Whatever express contract may have been made, however, no matter what its terms may be, cannot exempt or discharge respondent from liability for its violation of the duty imposed upon it by law by virtue of its character as a common carrier; that is to say, respondent cannot contract away its liability for tort—for negligence. And a declaration ignoring the contract and failing to allege the usual facts of consideration and promise and performance of conditions precedent is usually considered to be based upon the tort involved, notwithstanding the contract is referred to as matter of inducement tending to show the relation of carrier and shipper.

The Quickstep, 9 Wall. 670.

The libel affirmatively bases the libelant's claim upon the alleged negligence of respondent and does not base the same either upon the special contract nor upon implied contract. (Nelson v. Great Northern Ry. Co., 72 Pac. 642; Parrill v. Cleveland Co., 55 N. E. 1026.)

Referring to this subject, Justice Hammond, in the case of Whittenton Mfg. Co. v. Memphis Co., 21 Fed. 896, 901, 902, says:

> "While they (the authorities) leave the matter still in doubt, and evidently, as Mr. Schouler says, indicate a desire to narrow the plaintiff's election if possible, they come at last to the rule already indicated in the decision I have cited

> from the Supreme Court of the United States (New Jersey Co. v. Bank, 6 How. 344, 381) in determining the admiralty and suggested by Mr. Hutchinson, **that the innate and habitual** form of action on the ordinary contract for carriage, for a breach of duty to keep the goods safely, without loss by negligence, is 'founded in tort,' and the declaration will be so construed unless the special features of the case show it to have been 'founded in contract.' ''

The special features of this case indicate that libelant has followed this "innate and habitual form of action" in tort and further indicate that the contract has been ignored and its provisions not relied upon.

At this point we shall assume that the basis of recovery sought by libelant is the tort alleged in the libel, i. e., the alleged acts of negligence as distinguished from breach of contract. In view of the fact that these alleged acts of negligence and the resulting damages to the goods occurred on land while crossing the Isthmus of Panama, the tort is not a maritime tort and admiralty will not take cognizance of it. We have cited a number of decisions in our **Points and Authorities No. II** on this proposition (one of them, Herman v. Port Blakely Co., 69 Fed. 646 being by this Court), which are so apt and in point that further argument is waste of time and energy. In order that this Court retain jurisdiction it will be necessary for it to indulge in the presumption that the tort and damages occurred on navigable water. The Court cannot presume the facts necessary to its

jurisdiction; they must affirmatively appear. (7 Pet. 341.). The libel shows on its face and the proof demonstrates that the carriage involved was performed partly on navigable water and partly on land crossing the Isthmus of Panama, and there is no allegation, presumption, or inference that the tort or damage occurred during the voyage on navigable water and not while crossing the Isthmus of Panama. There are certainly not sufficient facts alleged to give the Court jurisdiction on the theory that the recovery is for a tort.

There is no jurisdiction of a breach of contract.

In stating a cause of suit for breach of contract, to give admiralty jurisdiction, the libel must go further than if the case were tort, and show not only that the damage occurred during the performance of that part of the contract which was to be performed on navigable waters, but must also show that the contract sued on is a maritime contract.

Courts of admiralty take jurisdiction of only such contracts of affreightment as are maritime. A contract to be performed upon land, therefore, is not within the jurisdiction.

The libel alleges that the goods were delivered aboard the steamer "Mills," then bound for the Isthmus of Panama, and that the goods were to be transported to Portland, Oregon. Whether or not the goods were to

be transported by sea on the "Mills" and "Stanley Dollar" is not alleged. The contract of carriage, in so far as it is alleged in the libel could have been performed by carriage across the continent on railways; nor, indeed, is there any allegation that the "Mills" ever sailed or that the carriage was not made by rail to San Francisco and thence by "Stanley Dollar" to Portland, or that it was not made entirely by rail from Philadelphia to Portland, except by inference. Whether the contract was to be performed on the seas or on land does not appear in the libel, nor does it appear how it was performed.

It is true that the libel alleges in paragraph third that the goods were shipped on board the steamship "Mills," "then lying in the Port of Philadelphia and then bound to the Isthmus of Panama, to be transported in said steamer **and connecting lines** and steamers to Portland, Oregon," yet this does not give any information as to how much of the carriage was agreed to be performed by connecting railway lines. Nor does the allegation in paragraph fourth of the libel "that respondent at Portland, Oregon, notified libelant that said goods and merchandise had arrived by its steamship 'Stanley Dollar'" amount to an allegation that they had so arrived.

By examination of the proof adduced at the hearing, however, it is disclosed from the bills of lading that the carriage was to be performed as follows: By steamship "Mills" to Colon, Panama; by railway on land

across the Isthmus of Panama to Balboa; by steamship "Stanley Dollar" from Balboa to Portland, Oregon, and that the goods were so carried.

We have then, before the court, a mixed contract calling for substantial performance both upon navigable water and upon land. The transportation across the Isthmus was as substantial and important as the transportation by sea to and from the Isthmus, for without it the transportation by sea would be useless. Of the contract for the carriage by sea and of all matters of performance thereof to be done on the sea admiralty has jurisdiction. But of that part of the contract requiring performance by carriage on land across the Isthmus of Panama we cannot perceive any jurisdiction whatsoever. It further appears that the Panama Railway Company was a party to these contracts of affreightment by virtue of being a connecting carrier across the Isthmus and that the special contracts provide that each carrier shall be liable alone for damage occurring to the goods while they were upon that carrier's particular part of the voyage.

The contracts were made by respondent and by the railways for the benefit and on behalf of all connecting carriers, so that, as a matter of fact, there are separate contracts for this through transportation. A contract with respondent for the carriage with the Lake Shore & Michigan Southern Ry. Co. for the carriage over its line of railroads; a contract with the Lehigh Valley Railroad Co. for the carriage over its line of railroad, and a

contract with the Panama Railroad Co. for the carriage over its line of railroad. (See Fed. cases 11112.)

Of the contract to be performed by these railroad companies on the land admiralty will not take jurisdiction, because they are not maritime. Or, to put it another way, admiralty will not take jurisdiction of that part of the contract which is to be performed exclusively on the land.

Justice Clifford, in The Belfast, 7 Wall. 624, says:

> "Principal subjects of admiralty jurisdiction are maritime contracts and maritime torts. * * * (1) Contracts, claims or service purely maritime and touching rights and duties appertaining to commerce and navigation, are cognizable in admiralty. (2) Torts or injuries committed on navigable waters, of a civil nature, are also cognizable in the admiralty courts. Jurisdiction in the former case depends upon the nature of the contract, but in the latter depends entirely upon locality. Mistakes need not be made if these rules are observed; but contracts to be performed on waters not navigable are not maritime any more than those made to be performed on the land."

> "The general result to which my inquiry into this subject has brought me," says Hopkinson, J., in Thackeray v. The American Boat Farmer, Fed. Cas. No. 13852, "is, that as to torts, injuries, and offenses, locality gives jurisdiction; but as to contracts, there must be something more. It is not enough that the service performed or to be per-

formed is on the high sea or on tide water; it must in its subject matter be maritime."

Is the contract alleged in the libel or shown by the testimony maritime in its nature, in so far as it affects the carriage by railroad across the Isthmus of Panama?

The libel fails to state where the alleged breach of contract, the alleged acts of negligence and the alleged resulting damages occurred, and we have therefore assumed that they occurred during the passage of the Isthmus of Panama.

A single contract may require several performances for a single consideration, such as (1) the transportation of goods from Chicago to Buffalo, by navigable water; and, (2) the storage of them at Buffalo. The storage of the goods is not a maritime contract, but the transportation of them is. Admiralty will enforce that part of the contract referring to the transportation of the goods, but will refuse to take cognizance of that part referring to the storage.

The Richard Winslow, 67 Fed. 259, affirmed 71 Fed. 426.

In the case just cited the damage to the cargo for which the libel was brought occurred during the performance of that part of the contract which was not maritime, i. e., the storage, just as the damages in this case occurred during the performance of that part of the contract which calls for transportation across the Isthmus. The carriage across the Isthmus is not mari-

time any more than the storage was and admiralty has no cognizance of it any more than it had in the case of the storage. In that case the damage to the cargo was a breach of contract, it is true, but it was not a breach of that part of the contract which was maritime.

This Court has decided the proposition, it seems to us, in the case of Pacific Coast S. S. Co. v. Ferguson, 76 Fed. 993, where it was claimed there was an entire contract for the transportation by navigable water from Moss Landing to San Diego of a shipment of barley and also payment of the railroad charges for the carriage of the barley on the railroad from Blanco to Moss Landing. A libel was filed to recover the amount of the railroad charges and it was claimed admiralty had no jurisdiction. The Court, however, held that that part of the contract which had to do with the carriage of the grain on land from Blanco to San Diego and the payment of the charges therefor was not maritime in its nature and not within the admiralty jurisdiction. In the course of his opinion, Circuit Judge Gilbert said:

> "It (referring to libelant) is in precisely the attitude it would occupy if the grain had been at Blanco, instead of at Moss Landing, when the contract was made, and it had undertaken to carry the same to San Diego at $1.00 for the carriage by land and $3.10 for that by water. The contract, as far as it pertained to the transportation, was purely a maritime contract, and enforceable in the admiralty. So far as it pertained to the railroad charges, it was not maritime; and the

admiralty court is without jurisdiction to entertain it."

As we have said, the negligence, the breach of contract and the resulting damage all occurred during the passage on land across the Isthmus of Panama. This transportation is not a maritime service and admiralty has no more to do with a contract for the same than it had to do with a contract to haul barley from Blanco to Moss Landing in the case just cited.

We shall refer to but one other case illustrating our contention and, while it sustains the jurisdiction, it is very much in point, because the jurisdiction is there sustained on account of a showing that the injury and damage occurred during the performance of that part of the contract which was to be done on the water. We refer to the case of Phoenix Ins. Co. v. Erie & W. Transp. Co., Fed. Cas. 11112, where a contract was made to transport grain by water from Chicago to Erie, thence by railroad to certain inland points. The loss occurred during the voyage by water from Chicago to Erie and objection was made to the jurisdiction because it was an entire contract for transportation from Chicago to the inland points, to be partly performed on the water and partly on the land. The Court held that if the loss or damage occurred during a performance of that part of the contract to be done on the water admiralty had jurisdiction; if it occurred during the transportation on land admiralty had no jurisdiction; it appeared that the loss occurred on the water, and the Court, for that reason, sustained the jurisdiction.

We shall repeat that there is nothing in the libel nor in the proofs indicating where the negligence or the damage occurred in this case. But it does appear from the libel and from the proof that the carriage of these goods was to have been and was made both by sea and by land. Inasmuch as the loss and damage occurred during the carriage by land, this Court has no jurisdiction either in tort or ex contractu. In order that the jurisdiction should appear it was necessary that the libel should allege that the damage occurred to the shipment while on board either or both the steamships involved and during the voyage at sea.

This disposes of the case as we see it.

The libel alleges that respondent agreed to insure the shipment, but neglected to do so. Such a contract, to **procure** insurance, it is well settled, is not cognizable in admiralty.

Marquardt v. French, 53 Fed. 603.

The City of Clarksville, 94 Fed. 201.

We respectfully submit that the decree of the District Court should be reversed and the libel dismissed for want of jurisdiction, or be remanded to the District Court, with instructions that libelant amend its libel and respondent be permitted to answer thereto.

Respectfully submitted,

WILLIAM DENMAN,

MALARKEY, SEABROOK & STOTT,

Proctors for Appellant.

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No. 2133

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

California-Atlantic Steamship Company
(a corporation),
Appellant,

vs.

Central Door & Lumber Company
(a corporation),
Appellee.

SUPPLEMENTAL BRIEF FOR APPELLANT.

Statement of Case.

This appeal is from a decree based upon a default taken against respondent for failure to except or answer to the libel. With the reasons for the default we are not familiar, nor are we here concerned, as they have been more fully dealt with in the brief of appellant's Portland counsel heretofore filed.

According to the record, no verbal testimony was given at the hearing, but the decree was based on the libel and certain letters of the respondent and the

bills of lading for the goods alleged to have been damaged.

The libel sets forth that the respondent is a common carrier and that "on or about the month of December, " 1910, pursuant to arrangement theretofore made with " respondent, libelant shipped and caused to be shipped " in good order and condition, on board the steamship " 'Mills', then lying in the port of Philadelphia, and " then bound to the Isthmus of Panama, to be trans- " ported in said steamer and connecting lines and steam- " ers to Portland, Oregon, * * *" certain goods.

There is no allegation of a promise or agreement to carry the goods, and there is nothing to show what was the "arrangement" referred to at the beginning of article 3 of the libel (apostles, page 4). The "arrangement" may have been to accept the goods as a common carrier and thereafter be subject to the obligations of that *status,* for a violation of which obligation it would be liable in *tort,* or it may have been a straight promise to carry safely to Portland, for a violation of which it would be liable in *contract.* We find on looking elsewhere in the libel that the libelant nowhere relies on contract but repeatedly places its cause of action on negligence.

In article 5 (page 5), the damage, which is particularly described, is alleged to be "all owing to the negli- " gence of respondent in stowing and handling the mer- " chandise". In article 6 (page 6), is set forth the pecuniary amount of the damage to the cargo "shipped " by libelant and destroyed by the negligence of re-

"spondent as aforesaid". In article 7 (page 6), it is alleged that libelant's loss "was occasioned solely by the "negligence and misconduct of the respondent, its em- "ployees, agents, or servants in the following par- "ticulars", describing various acts of negligence in stowing, handling, etc., in detail. In article 8, the loss is described as a "total loss by the negligence of respondent". It is thus clear that the libel is based on negligence and not breach of contract.

However, the question of the character of the suit is finally disposed of by the District Court in its decree, where it finds "that the libelant has sustained damages "by reason of the *negligence* of the respondent in the "sum of $7288.42".

The locus of the tort is nowhere set forth in the libel. The "connecting line" referred to in article 3 is undoubtedly the railroad across the Isthmus of Panama, a carriage through the tropics. Did the alleged negligence in stowing occur when the agents of the libelant placed the merchandise on cars of that road? Did the alleged negligence consist in stowing the building paper in open cars with the risk of tropical rainstorms? Was the glass broken when being taken from the train at its destination? Was the asphalt roofing improperly piled in a tropical sun, or otherwise exposed to heat when placed in the railroad yards at Colon? The libel nowhere states anything concerning the place in which any of the various acts of negligence so specifically set forth in detail, actually occurred. There is nothing whatsoever in the phraseology which

connotes or suggests that the acts of handling, stowage or carriage occurred on shipboard as distinguished from these acts where the carriage is by land in railway freight cars. The decree, following the libel, makes no finding as to the locus of the tort.

In connection with the railroad haul over the Isthmus the court will no doubt take judicial notice that it does not exceed a distance of fifty miles. As far as mere length of haul is concerned, this is of course a small fraction of the whole journey, but it must be remembered that it involves exactly as much "handling" and "stowage" as the voyages in either of the steamships. All the goods must be placed in cars, stowed there and handled out of them. Furthermore, the court will take notice of the fact that stowage in the comparatively smaller space of the freight car is much more difficult than in the wide and capacious area of a ship's hold.

When we come to the carriage itself the exposure to heat of a freight car in a tropical sun is much greater than that of a steamer with its cargo holds below the water line. Then there is the bumping and jostling of the cars, causing breaking strains on the goods which they would not experience on a steamship. Besides there is the likelihood of the use of open cars exposing the goods to rain.

The record and the judicial knowledge of the court as to the conditions necessarily encountered on a voyage from Philadelphia to the Isthmus of Panama by sea across to the Pacific by rail and thereon to Portland, Oregon, by sea clearly establishes that the

portion of the journey by rail is at least equal in danger as far as stowage and handling is concerned to either stage of the journey by sea, and while not as long presents a considerable period of exposure to heat, breakage and rain far likelier of damage than while the goods are in the hold of a vessel.

That is to say the land haul, in so far as it may have been the locus of the negligence and tort complained of in the libel, is a very important portion of the total carriage and cannot be regarded as a mere maritime incident in a long sea journey.

The libel also relies on an alleged agreement to procure insurance on the goods, the alleged acceptance of premiums for such insurance and the breach of the contract to procure the insurance (Arts. Third, Fourth and Seventh, apostles, pages 4, 5 and 7). The damages are alleged to be set forth in Schedule A and to amount "to the sum of $6,988.81 as aforesaid in- "cluding the *insurance* and other charges paid to re- "spondent". Nowhere in the libel or in the schedule is the amount claimed for insurance charges segregated from the alleged damages from negligent handling and stowage. That is to say even admitting the alleged negligence in handling the cargo was a maritime *tort,* the damages claimed are so mingled with damages in an unliquidated amount for the breach of a *non-maritime* contract to procure insurance, that the maritime portion cannot be segregated from the other.

It is true that there is a finding in the decree that the libelant sustained damages by reason of the *negligence*

of the respondent in the sum of $7,288.42 but this is not justified by allegations of a libel which do not set forth any specific sum as damages for negligence, but merely describe a lump sum including both damages for negligence and damages for breach of a non-maritime contract.

The libel alleges in article six (page 6) that the value of the goods destroyed by the negligence of respondent "*at the City of Portland on the 22nd day of* "*February, 1911, the date of arrival of said merchan-*" *dise* was $6988.81" and in article eight (page 7) that the schedule annexed sets forth the "market value of " the goods * * * amounting to the sum of $6988.81 "*as aforesaid*", that is to say at Portland on arrival. The schedule itself follows out this allegation and is cast in the form of a sold note for the goods by the libelant to the respondent at *Portland* (apostles, page 10).

At the trial the libelant introduced seven bills of lading, in the first four of which it appears that the shipper and carrier agreed that "the amount of any " loss or damage for which any carrier is liable shall " be computed on the basis of the value of the prop- " erty (being the bona fide invoice price if any to the " consignee including the freight charges if prepaid) " at the place and *time of shipment* under the bill of " lading". Exs. 3 (both bills) ~~pages~~ 4 and 5 (section 3 of endorsement on each). In the next three bills a similar agreement is made in the following words: " All liability under this bill of lading shall be esti-

"mated on the basis of the actual market value of the "goods *at the place and time of shipment*" (section 4 of endorsement).

There is no allegation in the libel nor any evidence in the record that the market value of the goods *at Portland* is the same as at the point of their shipment. There is therefore nothing in the record to sustain the finding that the damages amounted to $7288.42 (page 15) or any relevant evidence or admission by default whatsoever on the question of damages.

The libel alleged a damage of $6988.81 based on a valuation at Portland which we have shown is irrelevant under the stipulation in the bill of lading. However even if it were relevant, respondent's default admitted only this amount. The decree after default allows an amendment to the libel increasing the claim of damages for negligence to $7288.42 and the decree for that amount and interest.

We will endeavor in this brief to show:

1. That the libel and record fail to show the locus of the tort claimed and that the court sitting in admiralty had no jurisdiction to award damages for the negligence upon which the action is in part based.

2. That, even if the suit had sounded in contract for a carriage from Philadelphia down the Atlantic to the Isthmus of Panama, across the Isthmus to the Pacific and thence to Portland, there is no allegation that there was a breach of the agreement for that portion of the carriage which was on the sea, and hence no jurisdiction laid in admiralty.

3. That the decree should have dismissed the libel because, if it is founded at all on a maritime tort, the damages claimed for that tort are so interwoven with damages claimed for breach of a non-maritime contract to procure insurance, over which it has no jurisdiction, that the two could not be segregated.

4. That the decree should have dismissed the libel, it appearing from the bills of lading that the damages for injury to cargo were to be computed on the values at the point of shipment, and there being no allegations in the complaint or proof at the hearing of such value.

5. That the court had no jurisdiction over the person of the respondent to amend the libel after default to a greater amount than that originally set forth, nor to render a decree for such greater amount.

I.

The libel and record fail to show the locus of the tort claimed and the court sitting in admiralty had no jurisdiction to award damages for the negligence upon which the action is in part based.

It is an elementary principle in the law of federal procedure that the facts conferring jurisdiction on the court must affirmatively appear in the pleadings and, while a failure to state the facts does not make a decree void and subject to collateral attack, nevertheless, on appeal it will be reversed for that cause. As was said by Mr. Justice Washington in the leading case on this subject:

> "They are all of limited jurisdiction; but they are not, on that account, inferior courts, in the technical sense of those words, whose judgments, taken alone, are to be disregarded. If the jurisdiction be not alleged in the proceedings, their judgments and decrees are erroneous, and may, upon a writ of error, or appeal, be reversed for that cause."

McCormick v. Sullivant, 10 Wheat. 192 at 199;

Metcalf v. Watertown, 128 U. S. 586;

Fishback v. Western Union Tel. Co., 161 U. S. 96, at 100.

In *Cervantes v. The United States,* 16 Howard 619, the Supreme Court reversed the decree of the District Court because it did not affirmatively appear in the record that the land in dispute was situated in the Northern District of California.

In the "Confiscation Cases", where the libel was brought in the admiralty side of the court, the Supreme Court lays down the rule for the District Court, saying,

> "though not an inferior court, the district court is one of limited jurisdiction and that it has jurisdiction of the particular case which it attempts to adjudicate must always appear."
>
> *Confiscation Cases,* 20 Wall. 92-107;
>
> *People v. Steamer America,* 34 Cal. 676.

As was stated by Mr. Justice Harlan in a case in this circuit, referring to the jurisdictional averments,

> "they possess no powers except such as the constitution and the acts of congress concur in conferring on them and the *legal presumption* is that every cause is without their jurisdiction unless the contrary affirmatively appears."
>
> *United States v. Southern Pacific Co.,* 49 Fed. 299, 300.

In a very early case the Supreme Court laid down the same rule as controlling *in admiralty.*

> "The want of jurisdiction in the District Court is not put on the ground set up in the plea in the court below, that all the parties were citizens of the same state. This has been very properly abandoned here, as entirely inapplicable to admiralty proceedings in the District Court. But it is said that it does not appear upon the face of the proceedings that the cause of action properly belonged to admiralty jurisdiction. There can be no doubt that it must appear from the pro-

ceedings that the court had jurisdiction of the case."

Sylvan Peyroux v. Howard et al., 7 Peters 324, at 341.

The mere general averment in article X of the libel, that the acts were within the jurisdiction of the court is not a substitute for the showing of facts which in themselves confer the jurisdiction. As was said by the Supreme Court:

"The rule is without exception that the facts upon which the jurisdiction of the courts of the United States rests must appear in the record of all suits prosecuted before them. Ex parte Smith, 94 U. S. 455 (24:165); Metcalf v. Watertown, 128 U. S. 586 (32:543). The general averment in this bill that 'the amount or value in controversy in this suit exceeds the sum of $2000, exclusive of interest and costs' was a mere conclusion and that it was nowhere shown that the amount of any one of these distinct county assessments, the collection of which was entrusted to these tax collectors, exceeded that sum, while, on the contrary, the total valuation of the property of the telegraph company assessed as belonging to or operated by it in any one county was such as to preclude the idea that the amount of the assessment in such county would approach $2000."

Fishback v. Western Union Tel. Co., 161 U. S. 96, at 100.

Chief Justice Marshall states the proposition in the following words:

"The decisions of this court require that the averment of jurisdiction shall be positive; that the declaration *shall state expressly the fact on which*

jurisdiction depends. It is not sufficient that jurisdiction may be inferred argumentatively from the averments."

Brown v. Keene, 8 Pet. 115;

Robertson v. Vease, 97 U. S. 646 at 649.

That the jurisdiction of a court of admiralty for libels in tort is limited to those torts committed on the high seas and navigable waters is elementary.

Ex parte Phoenix Insurance Co., 118 U. S. 610;

Johnson v. Chicago & P. Elevator Co., 119 U. S. 388;

The Plymouth, 3 Wallace 20.

In our opening statement of fact we have shown that the libelant clearly relies on tort for his recovery and that the court in finding damages for negligence and not breach of contract and making its decree on that finding accepts its contention. The authorities clearly sustain the contention that the suit is not in contract.

In *The Quickstep,* 9 Wallace 665 (19 L. Ed. 767), the libel was filed by the owners of a canal boat, to recover for injuries to the boat and loss of a cargo he was carrying, in consequence of the alleged negligence of the respondent's tug. The libel set out a contract to tow, a deviation from the course stipulated in the contract, and the injury caused by the negligence of the tugboat. The respondent claimed that this was an action in contract but the court held that it was laid in tort, Davis J. in rendering the opinion of the court saying:

"The libel was not to recover damages but the breach of a contract, as is contended, but to ob-

tain a compensation for the commission of a tort. It is true it asserts a contract of towage, but this is done by way of inducement to the real grievance complained of, which is the wrong suffered by the libelant in the destruction of his boat by the carelessness and mismanagement of the captain of the Quickstep."

9 Wallace 665.

In *Whittendon Co. v. Memphis Packet Co.,* the court says:

"That the innate and habitual form of action on the ordinary contract for carriage, for a breach of duty to keep the goods safely without loss by negligence, is 'founded in tort' and the declaration *will be so construed unless the special feature of the case show it to have been founded in contract.*"

21 Fed. 896, at 902.

See also

Nelson v. Gt. Northern Ry. Co., 12 Pac. 642 (28 Mont. 297);

Bowers v. Ry., 107 N. C. 721, 12 S. E. 454;

Rideout v. Ry., 71 Wis. 237, 51 N. W. 437;

Moore v. Carriers, 1330.

The tendency of the courts to hold the action as one arising out of tort is illustrated by *Ry. Co. v. Chicago Portrait Co.,* 122 Ga. 11, 49 S. E. 727, where it was held that if the language of the petition is equivocal, and there is doubt as to whether an action on contract or in tort was intended, it is to be resolved by construing it as an action in tort, rather than as an action for breach of contract.

We have heretofore shown in our opening statement that nowhere in this proceeding has there been either allegation or proof as to where the alleged negligence by which the goods were injured took place. It is a necessary jurisdictional averment that it took place on navigable water. For all that appears it may have well taken place on the Isthmus of Panama. According to Mr. Justice Harlan's statement of the rule it will be presumed that it took place there and that the court had not jurisdiction rather than that it was received while on one of the steamships.

We do not have to go as far as to claim the benefit of a presumption. It is enough that all the decisions of the Supreme Court, in admiralty as well as at common law, require that the jurisdictional fact shall affirmatively appear, and that no facts are alleged as to where the goods were injured. It is therefore submitted that the decree should be reversed, the default set aside and the cause be remanded with leave to libelant to amend its libel if it can show jurisdiction, and serve the same on the respondent.

II.

Even if the suit had sounded in contract for a carriage from Philadelphia down the Atlantic to the Isthmus of Panama, across the Isthmus to the Pacific and thence to Portland, there is no allegation that there was a breach of the agreement for that portion of the carriage which was on the sea, and hence no jurisdiction laid in admiralty.

We have shown that the libel and decree both treat the action as laid in tort. However the result would be the same if it had been laid in contract for a carriage by sea from Philadelphia to Christobal, across the isthmus by rail to Balboa and thence by sea to Portland. The federal courts are ready to enforce the maritime portions of contracts of mixed maritime and non-maritime contracts when they are severable but hold that admiralty has no jurisdiction on an action brought on non-maritime portions of a contract both maritime and non-maritime.

Probably the most striking case on this point is decided by this court.

Pacific Coast SS. Co. v. Ferguson, 76 Fed. 993.

In that case the court squarely broke in two what it considered to be maritime and non-maritime parts of one contract and held that the admiralty would enforce the maritime part of the contract but could not enforce the non-maritime part. Here grain was ordered to be shipped from a port called Moss Landing to San Diego. The grain had been previously shipped by rail from Blanco, an inland point, to Moss Landing and

was at that point liable for storage and railroad freight charges. The Pacific Coast SS. Co. claimed that as part of the contract of shipment by water the shipper had agreed to pay the warehouse and railroad charges. On a plea to the jurisdiction the court held that, while the contract so far as it related to transportation by sea was purely maritime, so far as it related to railroad charges it was non-maritime and the admiralty court had no jurisdiction of a suit to enforce it.

Pacific Coast Co. v. Ferguson, 76 Fed. 993.

The comment of this court in the same case on the decision in *The Richard Winslow* is most illuminating.

> "In the case of The Richard Winslow, 67 Fed. 259, which was subsequently affirmed by the Circuit Court of Appeals of the seventh circuit, (18 C. C. A. 344, 71 Fed. 426), a schooner had received a cargo of corn for transportation from Chicago to Buffalo at three cents per bushel, 'including free storage in vessel at Buffalo harbor until April 1, 1894'. The vessel arrived at Buffalo in November, 1893. The consignors libeled the vessel upon a claim for damages to the cargo while stored in the vessel after her arrival at Buffalo. The court dismissed the libel, upon the ground that the portion of the contract which provided for storage after the arrival of the vessel at her port of destination was not maritime, and was not cognizable in the admiralty. In that case the consideration was not apportioned to the two services which were to be rendered by the vessel. It was entire. It is directly deducible, from the conclusions arrived at by both the courts, that, had the libel been brought by the owners of the vessel to recover the freight money under the contract, it would have been dismissed for want of jurisdiction, upon the ground that it was not based wholly upon a maritime con-

tract. A similar doctrine was applied in The Pulaski, 33 Fed. 383; The Murphy Tugs, 28 Fed. 429."

Pacific Coast SS. Co. v. Ferguson, 76 Fed. 993 at 996.

This holding of the court simply follows out the rule long observed in admiralty. In *Alberti v. The Virginia,* 1 Fed. Cas. 141 (C. C. S. D. N. Y., 1840), Mr. Justice Thompson, then on circuit duty, said:

"If a charter party embraces stipulations purely of a personal nature, having no relation to maritime service, in the safe carrying and delivery of the cargo, the admiralty jurisdiction of the District Court could not reach the case and afford relief for a breach of such part of the contract."

Richard v. Holman (D. Ct. May, 1903), 123 Fed. 734;

The Evangel, 94 Fed. 680;

The Murphy Tugs, 28 Fed. 429, 432.

So in contracts of shipment, the determination of the courts to break up contracts involving maritime and non-maritime matters, allowing admiralty jurisdiction over the maritime parts only, has been well brought out in two comparatively recent cases.

In *The Pulaski,* 33 Fed. 383, D. E. D., March, 1888. A vessel, at close navigation on lakes, received on board a cargo of wheat, to hold in storage till spring, and if not then discharged to transport the same. It was held that the contract was not maritime, and the court of admiralty had no jurisdiction of a suit brought for damages received during the winter. Henry B. Brown,

D. J., later justice of the United States Supreme Court, in rendering the opinion, said:

> "If the storage were a mere incident to the transportation, as, for instance, if the wheat were taken on board with the understanding that the vessel should sail as soon as a tug or consort should be procured, or as soon as the ice should leave the harbor. I should have no doubt that the vessel would be liable for any damage received by the cargo by reason of improper storage while waiting departure. In such case, the *storage being a mere incident of the transportation,* the whole contract would be adjudged to be maritime, and *a suit would lie in the admiralty for any damage occasioned after the cargo was received on board.*"
>
> *The Pulaski,* 33 Fed. 383.

These decisions are squarely in accordance with the contention of this brief. No one would deny that hauling goods on a railroad is just as much a non-maritime service as storing the goods. Neither of the acts are within the jurisdiction of admiralty nor are contracts calling for such acts in such jurisdiction.

Fortunately, however, the Supreme Court of the United States has passed upon a through contract of passage from New York to San Francisco, and has considered it as devisable into three contracts, New York to Colon, Colon to Panama, and Panama to San Francisco, in relation to the jurisdiction of admiralty over it.

The Moses Taylor, 4 Wall. 411.

Here one Hammond entered into through contract with Roberts, owners of The Moses Taylor, for his trans-

portation, with reasonable despatch from San Francisco to New York, via Panama. Plaintiff alleged in breach that he was detained at Panama eight days and *that the provisions on the voyage and the cabin were unhealthy.* He brought suit against the vessel in a justice's court in California, under a state law. The court held the contract was maritime and that the state courts had therefore no jurisdiction in rem in so far as it was a contract between San Francisco and Panama.

> Field, J., declared: "The contract, as set forth in the complaint, does not in terms provide for transportation on any portion of the voyage by The Moses Taylor, but the case was tried upon the supposition that such was the fact, and we shall, therefore, *treat the contract as if it specified a transportation by that steamer on the Pacific for the distance between Panama and San Francisco.* For an alleged breach of this contract, the present action was brought under the statute mentioned, in a court of a justice of the peace, held within the City of San Francisco * * *
>
> "The case is clearly one within the admiralty and maritime jurisdiction of the federal courts. The contract for the transportation of the plaintiff was a maritime contract. As stated in the complaint, it *related exclusively to a service to be performed on the high seas,* and pertained solely to the business of commerce and navigation. There is no distinction in principle between a contract of this character and a contract for the transportation of merchandise."
>
> *The Moses Taylor,* 4 Wall. 411, at 426, 427.

It is illuminative to read the comment by Morrow, then D. J., in the Moses Taylor case, made in *The Willamette Valley,* 71 Fed. 715 (D. C. N. Cal. 1896).

> "In the Supreme Court it was contended, in favor of the jurisdiction of the state court, among other things, that, as the land carriage at the Isthmus was a substantial part of the voyage, the jurisdiction of the admiralty court did not attach, for the reason that a contract, to come within that jurisdiction 'must be wholly of admiralty cognizance, or else it was not at all within it'; citing the case of The Pacific, supra. The Supreme Court held that the case presented was clearly one within the admiralty and maritime jurisdiction of the federal courts, and that the state court had no jurisdiction of the case in a proceeding in rem. Clearly, the court did not consider the incidental land transportation at the Isthmus, or the breach of contract involved in the detention of the plaintiff on land, *as impairing the admiralty jurisdiction over that part of the contract relating exclusively to a service to be performed on the high seas,* and pertaining solely to the business of commerce and navigation."

The case was preceded by *Phoenix Ins. Co. v. Erie & W. Transportation Co.,* 19 Fed. Cases 1112 (D. C. E. D. Wis. 1879), which involved a contract made for the shipment of grain from Chicago by which it was agreed that the Anchor Line should carry the grain to Erie and deliver it to the Elevator Company, as agent of the consignee, for transshipment by rail to certain inland points in Pennsylvania. The bills of lading denoted a rate of freight charged for a continuous transportation service from the point of shipment to the inland points named, and provided that only that carrier should be liable for loss in whose actual custody the grain might be at the time of the loss. The court held that *in case of loss while the grain was in the course of*

water transit, the court of admiralty had jurisdiction of an action against the Anchor Company.

> Dwyer, C. J.: "The true test of a maritime contract or a maritime service, is whether it is to be substantially performed and rendered on navigable waters. If it is, then it is of maritime character and the court of admiralty has jurisdiction. If it is not, then jurisdiction is disclaimed. That a very substantial part of the service to be performed under these contracts was to be performed upon navigable waters is not to be disputed. *The loss happened upon these waters, while such service was being rendered,* and under the construction of the contracts before given and by virtue of the principle last stated, I cannot doubt that a court of admiralty has jurisdiction of the subject matter of this suit."
>
> *Phoenix Co. v. Trans. Co.,* 19 Fed. Cases, at 535.

Now, presuming that in the case at bar the libel counted on a contract to carry on the two oceans and across the Isthmus of Panama, there is no allegation of a breach of the promise to carry safely on the oceans. For all we can tell, the breach alleged (if it be a breach) applies solely to the portion of the promise to carry safely over the Isthmus. All that was said in the last chapter about the necessity for the affirmative pleading of the facts conferring the jurisdiction, applies here. Such facts as to the breach are not pleaded, and the relief suggested in the last chapter, we submit, should be granted.

III.

The want of jurisdiction for the decree appears affirmatively in the libel for if it is founded at all on a maritime contract or tort, the damages claimed therefor are so interwoven in the libel with damages claimed for breach of a separate non-maritime contract to procure insurance, over which it has no jurisdiction, that the two can not be segregated.

Not only is a failure to allege jurisdictional facts a matter that may be availed of by either party, at any time, but the appellate court itself, even where neither party has raised the point, will take cognizance of the defect and reverse the decree of the lower court. It therefore makes no difference whether the point raised in this section is sufficiently assigned as error.

Metcalf v. Watertown, 128 U. S. 586;
Minnesota v. Hitchcock, 185 U. S. 373.

As we have pointed out in our opening statement, the libel relies on two causes of action, first, the negligence in stowage, loading, etc., and, second, the breach of an agreement to procure insurance of the cargo.

In this connection, it is important to note that the contract for insurance is not a mere incidental part of the obligation to carry the goods. It is a separate obligation, and has an entirely separate consideration. In article 7 of the libel (page 7), it is alleged that "The " respondent neglected to insure said shipment and to " deliver insurance policies to libelant; and respondent " has failed to collect and pay or cause to be paid any " insurance to libelant on account of the said loss and

"damage, although libelant paid respondent certain "sums, for which respondent presented bills, as in- "surance premiums," while in article 8 the total loss is set forth as $6,988.81, "including the *freight* in- "surance and other charges paid to respondent by "libelant". That is to say, the carriage for which freight was paid was a transaction separate from the agreement to insure for which the moneys advanced for premiums were the consideration.

Yet nowhere in the libel is there any separate statement as to how much those premiums were, or how much the damage to cargo was. The court knows that both together, plus the freight moneys, equaled $6,988.81 for the sixth and eighth articles allege it so, but how much of this is for the maritime tort and how much for the non-maritime obligation for breach of the agreement to insure, or the obligation to return the premiums, is nowhere disclosed.

It therefore follows that any decree based on an allegation in a libel of a damage for breach of a non-maritime contract is in excess of the court's jurisdiction and must be reversed.

The principle involved is not unlike that set forth by Taney, J., in *Turner v. Beacham,* decided by the circuit court of Maryland:

> "And I consider it to be a clear rule of admiralty jurisdiction, that although the contract which the party seeks to enforce is maritime, yet, if he has connected it *inseparably* with another contract

> over which the court has no jurisdiction, and they are so blended together that the court cannot decide one with justice to both parties, without disposing of the other, the party must resort to a court of law or a court of equity, as the case may require, and the admiralty court cannot take jurisdiction of the controversy."
>
> *Turner v. Beacham,* Fed. Cases 14,252, at page 348.

If this be true where the two elements are blended in a single contract, it is true a fortiori where the transactions are entirely separate and only "inseparably blended" in the pleading of the damages from both in a single sum.

That the contract to procure insurance is a non-maritime contract, is clearly established by the following cases:

Marquardt v. French, 53 Fed. 603;
Reliance Lumber Co. v. Rothschild, 127 Fed. 745;
City of Clarksville, 94 Fed. 201;
Harvey and Henry (C. C. A.), 86 Fed. 656;
The Thames, 10 Fed. 848;
Crystal Stream, 25 Fed. 575;
The Paola R., 32 Fed. 174;
Doolittle v. Knobeloch, 39 Fed. 40;
Diefenthal v. Hamburg American SS. Co., 46 Fed. 397.

The case at bar, with its separate considerations for its maritime and non-maritime transactions, is clearly distinguishable from *Nash v. Bohlen,* 167 Fed. 427, where the contract of affreightment and for insurance was alleged as a single contract, and from *Rosenthal v. The Louisiana,* 37 Fed. 264, where, for a single consideration, the ship agreed to carry and insure and "the basis of the ship's liability is a maritime con-"tract".

It is therefore submitted that the decree was beyond the jurisdiction of the District Court in admiralty and must be reversed.

IV.

The decree should have dismissed the libel, it appearing from the bills of lading that the damages for injury to cargo were to be computed on the values at the point of shipment, and there being no allegations in the libel or proof at the hearing of such value.

The court sitting in admiralty is a court of appeal and not of error. The trial is theoretically a new trial and the whole case is before the court. The rule requiring assignments of error is enforced with great liberality and plain errors not assigned are duly considered by the court.

City of Memphis v. St. Louis Ry. Co., 183 Fed. 529;

Chicago R. I. & P. Ry. Co. v. Barrett, 190 Fed. 118 at 125;

Rule 11, C. C. A., 9th Circuit.

The error set forth in this chapter of our brief is "obvious upon inspection and of a controlling char- "acter."

P. P. Mast Co. v. Drill Co., 154 Fed. 45 at 51.

It is that the bills of lading offered in evidence by libelant show an agreement that respondent's damages shall be based on the valuation at the time and place of shipment, and that there is no evidence in the record, nor any allegation in the libel (even if a claim for unliquidated damages could be admitted by a default) as to what that value was.

As we have pointed out, the libel alleges in article 6 (page 6), that the value of the goods destroyed by the negligence of respondent "*at the City of Portland on the "22nd day of February, 1911, the date of arrival of "said merchandise,* was $6988.81," and in article 8 (page 7), that the schedule annexed sets forth the "market value of the goods * * * amounting to "the sum of $6988.81, *as aforesaid",* that is to say at Portland on arrival. The schedule itself follows out this allegation and is cast in the form of a sold note for the goods by the libelant to the respondent, *at Portland* (apostles, page 10).

At the trial, the libelant introduced seven bills of lading, in the first four of which it appears that the shipper and carrier agreed that "the amount of any "loss or damage for which any carrier is liable shall "be computed on the basis of the value of the prop- "erty (being the bona fide invoice price if any to the "consignee, including the freight charges if prepaid) at "the place and time of shipment under the bill of "lading" Exs. 3 (both bills), pages 4 and 5 (section 3 of endorsement on each). In the next three bills a similar agreement is made in the following words: "All "liability under this bill of lading shall be estimated "on the basis of the actual market value of the goods "at the place and time of shipment" (section 4 of endorsement).

There is no allegation in the libel, nor any evidence in the record, that the market value of the goods *at*

Portland is the same as at the point of their shipment. There is therefore nothing in the record to sustain the finding that the damages amounted to $7288.42 (page 15) or any relevant evidence or admission by default whatsoever on the question of damages.

It is elemental that a valuation on the Atlantic seaboard in December is not evidence of a value two months later at Portland, over three thousand miles away.

Carver's Carriage by Sea, 4th Ed. 727;
Texas Ry. v. White, 80 S. W. 641;
Railway Co. v. De Shong, 39 S. W. 260 (Ark.).

As it stands then, there is absolutely nothing in the record on which to base any decree for damages. It is submitted that the decree must be reversed.

V.

The court had no jurisdiction over the person of the respondent to amend the libel to a greater amount than that originally set forth, nor to render a decree for such greater amount.

The libel alleged a damage of $6988.81, based on a valuation at Portland, which we have shown is irrelevant under the stipulation in the bill of lading. However, even if it were relevant, respondent's default admitted only this amount. The decree after default allows an amendment to the libel increasing the claim of damages for negligence to $7288.42, and decrees for that amount and interest.

That a default admits only those matters which are clearly pleaded is elemental.

Ohio Cent. Ry. Co. v. Central Trust Co., 133 U. S. 83, 90;
Thompson v. Wooster, 114 U. S. 104;
U. S. v. Tomato Catsup, 166 Fed. 773;
Davis v. Sheiden, 104 U. S. 83.

As a default gives jurisdiction in personam over the defendant only for these admitted matters, a judgment in excess of the amount claimed is outside the court's jurisdiction and must be reversed.

Ruth v. Smith, 68 Pac. 278 (Col.);
Russell v. Shurtliff, 65 Pac. 27;
Seltzer v. Davenport Co., 49 Atl. 852 (Conn.);
Johnson v. Mantz, 27 N. W. 467 (Ia.);
23 Cyc., 764, and cases.

The decree is therefore on the face of the record in excess of the court's jurisdiction obtained by the default and the point as a jurisdictional question can be raised on appeal without assignment of error. Even under Rule 11, no error could be plainer.

As the damages are unliquidated, the defect cannot be remedied by a mere reduction of the amount awarded.

Ruth v. Smith, 68 Pac. 278.

It is therefore submitted that the decree must be reversed.

Respectfully submitted,

T. A. Thacher,
G. S. Arnold,
William Denman,
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Of Counsel.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH DISTRICT

CALIFORNIA-ATLANTIC STEAMSHIP COMPANY, a Corporation,
Respondent-Appellant,

vs.

CENTRAL DOOR AND LUMBER COMPANY, a Corporation,
Libelant-Appellee.

No. 2116

Brief of Libelant-Appellee

UPON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON.

Statement

In November, 1910, the Appellee entered into an agreement with the Appellant, a common carrier, to ship from Philadelphia on a steamer of the Appellant certain goods of Appellee, viz: Asphalt roofing, deadening felt, building paper, paint, window glass and plate glass for

delivery to the Appellee at Portland, at an agreed freight rate.

The contract between the parties consists of the two letters shown on pages 29 and 30 of the record. No bills of lading were issued to Appellee, and Appellee had no notice of any bills of lading, or of their contents, issued by Appellant, until long after the loss occurred.

These goods were shipped at Philadelphia, in the month of December, 1910, on board the steamship "MILLS," and arrived in Portland on Appellant's steamship "STANLEY DOLLAR" about February 22, 1911, and after payment by the Appellee of charges, including freight advanced to railroads, insurance premiums and freight earned by Appellant, amounting to $1233.81, the goods were delivered to Appellee. The bills were presented, while the goods were still on board the vessel, and before Appellee was permitted to examine the shipment and its bad condition was not discovered until the shipment was landed on the wharf. The libel avers that the goods had been water soaked, compressed, broken and otherwise damaged, by negligence of the Appellant, in stowing, handling, and carrying the same.

Appellee promptly notified Appellant of its claim for damage; and March 16th, 1911, at the request of Appellant, sent certified copies of original invoices covering the shipments, with the claim for damages. The Appellant thereafter for several months, failed to make any statement to Appellee in regard to the damage, or to settle for the same, or to make any response to the letters of Appellee except that the matter was being investigated, and on the 5th of July, 1911, Appellee filed a libel *in personam* with a clause of foreign attachment, and Appellant thereafter appeared in the cause and filed its stipulations for costs and value and

took an order by stipulation extending its time to further appear until August 21, 1911.

No further stipulation was made between the parties and in the latter part of September, one of the proctors for the Appellee met one of the proctors for the Appellant and stated to the latter that he had been in default for a month and that unless an answer was filed shortly, further courtesy would not be extended. Proctor for Appellant replied that he would file his answer during the first week in October. No answer having been filed, nor any further stipulation made in regard to the matter, either verbal or written, the default of Appellant was taken in open Court on October 27, 1911; and proof of the facts stated in the libel was offered and final decree entered on October 30, 1911.

The statement that counsel for Libelant informed Respondent's counsel that no default would be taken without prior notice is *dehors* the record and is denied, and was denied on the motion to open the default, but even if the counsel for the Appellant understood the counsel for Appellee to make such a statement, counsel for Respondent did have notice, as above stated when he was told if he did not answer immediately, further courtesy would not be extended.

But the motion to open the default is not before this Court and would not have been alluded to except for the statement made on page 5 of Appellant's brief.

On the motion to open the default no meritorious defense was set forth and the motion was denied, and from the decree rendered by the District Court in favor of Appellee, Appellant now appeals and attacks the jurisdiction of the admiralty court.

It will be observed by the Court that the record does

not purport to contain all the evidence but only certain exhibits and that there is no certificate by the District Judge that all the evidence appears in the record. The letters (p. p. 29, 30) were offered to show the contract between the parties; the bills of lading were offered, as an admission on the part of Appellant that the goods were received in good order and condition and oral evidence was also offered on this point. Therefore, in the absence of the evidence from the record, this Court is bound to presume that proper and sufficient evidence was offered to sustain the decree and the averments of the libel.

Upon the record, as it stands, it conclusively appears that the Appellant is a common carrier, and liable as an insurer; that the contract between the parties was one of affreightment; was to be wholly performed upon the sea, except as to portage across the Isthmus of Panama, and was therefore maritime; that the goods were delivered in good order and condition on board Appellant's steamer at Philadelphia; that the goods were delivered to Appellee from Appellant's steamship at Portland, in a damaged condition due to contact with water, breakage, improper stowage, handling and carriage by Appellant; and that all the facts with respect thereto are peculiarly within the knowledge of Appellant, its servants, agents and employees; and that the burden was upon Appellant to allege and prove, if it could, any matters of defense and excuse for non-performance of the contract which was entire; and that Appellant wholly failed to discharge this burden.

Points and Authorities

I.

The legal presumption is in favor of the decree.

Masterson vs. Howard 18 Wall. 99.
Thompson vs. Wooster, 114 U. S. 104-114.
Miller vs. U. S. 11 Wall. 268.
Bixby vs. Deemar, 54 Fed. 718.
The Philadelphian 60 Fed. 423.
Nelson vs. White, 83 Fed. 215.
The Brandywine, 87 Fed. 652.

II.

The ruling of the District Court upon the motion to open the default is not reviewable on appeal.

Cape Fear T & Trans. Co. vs. Pearsall 90 Fed. 435.

III.

The contract between the parties is within admiralty jurisdiction.

New Jersey Steam Navigation Co. vs. Merchants Bank, 6 Howard 344.

Moorewood vs. Enequist, 23 Howard 491 p. 493.

The Moses Taylor, 4 Wall. 411.

Insurance Co. vs. Dunham, 11 Wall. 1 p. 29.

Phoenix Ins. Co. vs. Erie & W. Transportation Co., Fed. cases No. 11, 112. Vol. 19, p. 553 affirmed in 117 U. S. 312.

Monteith vs. Kirkpatrick, 3 Blatch 279; Fed. cases No. 9271.

Dailey vs. City of New York, 128 Fed. 796-798.

IV.

The burden was upon the Respondent to excuse its non-performance of the contract of affreightment.

The William Taber 30 Fed. cases 17957.
Clark vs. Barnwell, 12 How. 130.
Propeller Niagara vs. Cordes, 21 Howard 7 p. 29.
The Edwin I. Morrison 153 U. S. 199-211.
The Majestic 166 U. S. 375-386.
Cuming vs. The Baracouta, 40 Fed. 498.
The Lydian Monarch 23 Fed. 298.,
The New England 110 Fed. 415.
Southern Pacific Co. vs. Arnett 111 Fed. 849-852.
Pacific Coast Steamship Co. vs. Bancroft-Whitney Co. 94 Fed. 180-196.

V.

The libel does not sound in tort.

New Jersey Steam Navigation Co. vs. Merchants Bank, 6 Howard 344, 411-412.
The Plymouth, 3 Wall 20-34.
Whittenton Mfg. Co. vs. M. & O. River P. Co., 21 Fed. 896.
Pacific Coast Steamship Co. vs. Bancroft-Whitney Co. 94 Fed. 180-193.

VI.

The presumption is that the damage occurred while the goods were in Respondent's possession.

6 Cyc. 491 and authorities cited in note.

Argument

The libel alleges that the Respondent is a common carrier, and employed steamships in carrying cargo between Philadelphia and other Atlantic ports, and Portland and other Pacific ports, and among the steamships so owned or chartered by the respondent were the steamships "MILLS" and "STANLEY DOLLAR," and that in the month of December, 1910, persuant to an arrangement theretofore made with Respondent, Libelant shipped and caused to be shipped, in good order and condition on board the steamship "MILLS" at Philadelphia, certain goods, wares and merchandise, properly packed for carriage and handling consigned to Libelant at Portland, Oregon.

That on or about the 22nd day of February Respondent notified Libelant that said goods and merchandise had arrived at the dock in Portland by the steamship "STANLEY DOLLAR" and presented charges for freight and insurance premiums and demanded payment therefor, while the merchandise was still in the hold of the steamship; and after payment of said bills, Respondent delivered the merchandise in damaged condition.

The libel further alleges that the building paper had been *damaged by water;* the glass had been broken by improper handling; that the packages of paint were broken and contents spilled; that the shipment was improperly *stowed, carried and handled by Respondent, its employees, agents and servants.* The libel is therefore founded upon a contract of affreightment, a very substantial part of which was to be performed upon the sea, and what the contract was, appears from the letters which appellant has attached to the record, pages 29 and 30. The bills of lading attached

to the record, pages 31 to 36 are not the contracts between the Libelant and Respondent; they are not made with Respondent nor assigned to it and are not entitled to be considered by the Court on this appeal. They were offered in the District Court merely for the purpose, in connection with other proof, of showing that the goods were received by Respondent on board its steamship at Philadelphia in good order and condition.

Over six thousand miles of the carriage was upon the sea; less than fifty miles of carriage occurred on land across the Isthmus of Panama; the goods were delivered in a damaged condition and the legal presumption is that the damage occurred through the fault of the carrier while the goods were in its possession, in the absence of any averment or proof, on behalf of the carrier, to the contrary. There is nothing in the libel in regard to the condition of the goods when delivered which warrants the inference that the damage occurred elsewhere than on shipboard. On the contrary the averment that the cargo was water soaked clearly indicates that the damage occurred on board ship, and the allegation that the *goods were improperly handled and stowed by Respondent,* its agents, servants and employees, is also an allegation to the same effect, viz., that the damage occurred while the goods were on board ship.

The argument in appellant's brief is based upon an erroneous assumption of law, viz; that the burden is upon the Libelant to show where and how the damage occurred; that this is erroneous we shall hereafter show by the authorities cited. It is also based erroneously upon an assumption of fact, instead of a proved fact, to-wit: that the damage occurred on land. Having assumed two false premises, the argument proceeds necessarily to a false conclusion.

No meritorious defense is suggested; the damage occurred between the latter part of December, 1910, and the

latter part of February, 1911. The facts in respect to the cause thereof were peculiarly and solely within the knowledge of Respondent, and although the Respondent had due notice from the Libelant of the damage claimed with full particulars thereof, in March, 1911, no suggestion of adjustment or excuse was made, and the libel was filed July 5, 1911, and the default was not entered until more than two months after the Respondent became in default. This Court must also assume that no sufficient grounds were urged for the opening of the default on the motion made for that purpose in the District Court, and therefore the question before this Court is purely one of jurisdiction.

We contend—First: That, under the authorities and the practice, the contract of carriage was one which was to be substantially performed upon the sea and is therefore maritime and within admiralty jurisdiction.

Second: That the libel having alleged receipt by Respondent on its steamship at Philadelphia in good condition, and delivery by Respondent at Portland, in a damaged condition, the burden was upon Respondent to excuse itself, and having wholly failed so to do, it cannot now, by this appeal, impose a burden upon the Libelant which did not rest upon it in the Court below.

I.

THE LEGAL PRESUMPTION IS IN FAVOR OF THE DECREE.

The decree having been taken *pro confesso* the presumption is that all the facts necessary to warrant the decree have been properly found, if they are substantially averred in the libel.

This is the unquestioned rule in equity practice.

Masterson vs. Howard, 18 *Wall.* 99.

In this case the rule was laid down as above stated. The question of jurisdiction was also raised in that case on the ground that the decree *pro confesso* was rendered in a suit between alien enemies (Citizens of California and Illinois against citizens of Texas), during the Civil War and before its termination, and was therefore a nullity. The Court denied the contention and upheld the jurisdiction.

Thompson vs. Wooster, 114 *U. S.* 104-114.

In that case the Court held the rule substantially as above stated.

Miller vs. U. S., 11 *Wall.* 268.

The rule in admirality and revenue cases appears in the syllabus as follows:

> "4. In admiralty and revenue cases when a default has been duly entered to a monition founded on information averring all the facts necessary to a condemnation, it has substantially the effect of a default to a summons in a court of common law. It establishes the fact pleaded and justified a decree of condemnation.
>
> "5. Where a Court having jurisdiction of the case and of the parties enters a judgment, there is a presumption that all the facts necessary to warrant the judgment have been found, if they are sufficiently averred in the pleadings."

Birby vs. Deemar, 54 *Fed.* 718-720. (Circuit Court of Appeals, Fifth Circuit).

A libel *in personam* was filed for loss of cargo on Respondent's steamer.

Held: That a decree in admiralty awarding damages to a shipper should be affirmed on appeal when it does not clearly appear on what grounds the District Court based its award, and the proof does not clearly fail to show that the

loss was caused by the master's neglect to use proper means for saving the cargo.

The Philadelphian 60 *Fed.* 423. (Circuit Court of Appeals, First Circuit).

Held: Unless the proofs in instance causes in the District Court which are intended for review in the Circuit Court of Appeals, are in some form reduced to writing, or an equivalent therefor is found in the record, the Court will decline to try the facts anew.

Nelson vs. White, 83 *Fed.* 215. (Circuit Court of Appeals, Ninth Circuit).

The Court said at page 218:

> "Therefore, both under the rules of the Supreme Court and of this Court, and of the doctrine laid down by the Supreme Court, that an appeal in admiralty is a trial *de novo,* the testimony taken in the Court below should have been certified up in the transcript of record on appeal, in the absence of a stipulation that it might be omitted."

The Brandywine 87 *Fed.* 652. (Circuit Court of Appeals, Fourth Circuit).

Held: It was the settled practice of these Courts to give great weight to the conclusions of fact by the trial judge, unless they are based on evidence manifestly insufficient.

II.

THE RULING OF THE DISTRICT COURT UPON THE MOTION TO OPEN THE DEFAULT IS NOT REVIEWABLE ON APPEAL.

Cape Fear T. & Trans. Co. vs. Pearsall, 90 *Fed* 435. (Circuit Court of Appeals, Fourth Circuit).

Held: That the opening of a default in admiralty being discretionary with the Court under Admiralty Rules

29 and 40, the ruling of the District Court upon the motion therefor is not reviewable in the Court of Appeals, citing many authorities supporting the proposition.

The rule is so well settled that it is unnecessary to comment further upon it, and is only stated in answer to Appellant's Assignment of Error VIII, to the effect that the Court erred in denying the application of Respondent for an order setting aside the default and we do not understand that the appellant really insists upon the assignment of error in that behalf.

III.

THE CONTRACT BETWEEN THE PARTIES IS WITHIN ADMIRALTY JURISDICTION.

The contract between the parties was an entire contract of affreightment, the substantial performance of which was to be upon the sea and is therefore maritime and within the jurisdiction of admiralty.

New Jersey Steam Navigation Company vs. Merchants Bank, 6 Howard 344 is a leading case on the subject. The suit was instituted upon a contract of affreightment for the purpose of recovering a large amount of specie lost on the "Lexington," one of the steamers of Respondent running between New York and Providence, which took fire and was consumed in the month of January, 1840 on Long Island Sound.

The Respondent objected, first: That the suit was not maintainable by the Libelants, the contract having been made with the expressman, Harnden; second, that if the suit could be maintained for the Libelants they must succeed if at all, through the contract with Harnden, which contract exempts them from all responsibility as carriers of the specie; and third, that the District Court had no juris-

diction, the contract of affreightment not being the subject of admiralty cognizance.

The case was ably argued by eminent counsel, and the prevailing opinion was written by Justice Nelson, and after an exhaustive discussion of the subject, the conclusion of the Court is summed up in these words, (p. 392):

> "On looking into the several cases in admiralty which have come before this Court, and in which its jurisdiction was involved, or came under its observation, it will be found that the inquiry has been, not into the jurisdiction of the Court of Admiralty in England but into the nature and subject matter of the contract; whether it was a maritime contract, and the service, a maritime service to be performed upon the sea, or upon water within the ebb and flow of the tide. And, again, whether the service was to be substantially performed upon the sea, or tide waters, although it had commenced and had terminated beyond the reach of the tide; if it was, then jurisdiction has always been maintained. But if the substantial part of the service under the contract, is to be performed beyond tide waters, or if the contract relates exclusively to the interior navigation and trade of a State, jurisdiction is disclaimed."

Moorewood vs. Enequist, 23 *Howard,* 491.

In this case Mr. Justice Grier delivered the opinion of the Court and said on page 493, in reference to the question of jurisdiction:

> "We do not feel disposed to be again drawn into the discussion of the arguments which counsel have reproduced on this subject. The case of the New Jersey Steamboat Co. vs. The Merchants Bank of Boston, 6 Howard 344, was twice argued (in 1847 and 1848) at very great length. The whole subject was most thoroughly investigated both by counsel and the Court. Everything connected with the history of courts of admiralty, from the reign of Richard the Second to the present day —— everything which the industry, learning and re-

> search, of most able counsel could discover, was brought to our notice. We then decided that charter parties and contracts of affreightment are 'maritime contracts' within the true meaning and construction of the Constitution and Act of Congress, and cognizable in courts of admiralty by process either *in rem* or *in personam.*"

The Moses Taylor, 4 *Wall.* 411.

In this case one Hammons entered into a contract with Roberts as owner of the steamship, for transportation from New York to San Francisco, as a steerage passenger, with reasonable dispatch and to furnish him with proper and necessary accommodations on the voyage. For alleged breach of this contract Hammons brought an action, under a law of the State of California, against the vessel in the Justice's Court of San Francisco. The breach alleged was that the plaintiff was detained at the Isthmus of Panama eight days and that the provisions furnished him on the voyage were unwholesome and that he was crowded into an unhealthy cabin, without sufficient room or air for either health or comfort, in consequence of a large number of steerage passengers, more than the vessel was allowed by law to have, or could properly carry. The agent of the vessel filed an answer in which he denied the allegations of the complaint, and asserted that the Court had no jurisdiction, because the cause of action as against said vessel, was one of which the Courts of Admiralty had exclusive jurisdiction. The justice decided that he had jurisdiction and gave judgment for the plaintiff. The case was taken to the County Court, where the objection to the jurisdiction was again made and again overruled, and, final judgment being entered in favor of the plaintiff, the case was taken to the Supreme Court of the United States on a writ of error.

In the Supreme Court it was contended, in favor of the jurisdiction of the State Court, among other things that, as the land carriage at the Isthmus was a substantial part of the voyage, the jurisdiction of the Admiralty Court did not attach, for the reason that a contract, to come within that jurisdiction, "must be wholly of admiralty cognizance, or else it was not at all within it." The Supreme Court held that the case presented was clearly one within the admiralty and maritime jurisdiction of the Federal Courts, and that the State Court had no jurisdiction of the case in a proceeding *in rem.*"

Insurance Company vs. Dunham 11 Wall. 1.

In this case a libel *in personam* had been filed in the District Court for the District of Massachusetts on a policy of insurance dated at Boston, whereby the Insurance Company, a Corporation of Massachusetts agreed to insure Dunham, the libelant, a citizen of New York in the sum of Ten Thousand Dollars on a vessel called "The Albina" for one year and the libelant alleged that within a year the vessel was run into by another vessel on the high seas through the negligence of those navigating the other vessel and had thereby sustained damage of which he claimed payment from the Insurance Company. The question was whether the District Court, sitting in admiralty had jurisdiction to entertain a libel *in personam* on a policy of marine insurance to recover for a loss.

Mr. Justice Bradley delivering the opinion of the Court, after referring to the case of the New Jersey Steam Navigation Company vs. The Merchants Bank, which he stated "was a libel *in personam* against the Company *on a contract of affreightment* to recover for the loss of specie by the burning of the steamer "Lexington" on Long Island Sound, says at page 28:

"In the case of *The Moses Taylor,* 4 Wall. 411, it was decided that a contract to carry passengers by sea as well as a contract to carry goods, was a maritime contract, and cognizable in admiralty, *although a small part of the transportation was by land, the principal portion being by water.* In a late case of affreightment, that of the Belfast, it was contended that admiralty jurisdiction did not attach, because the goods were to be transported only from one port to another in the same State, and were not the subject of Interstate Commerce. But as the transportation was on a navigable river, the Court decided in favor of the jurisdiction, because it was a maritime transaction. Justice Clifford delivering the opinion of the Court says: "Contracts, claims or service, purely maritime and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty courts. Torts or injuries, committed on navigable waters, of a civil nature are also cognizable in the Admiralty Courts. Jurisdiction in the former case depends upon the nature of the contract, but in the latter it depends entirely upon the locality." It thus appears that in each case the decision of the Court and the reasoning on which it was founded have been based upon the fundamental inquiry whether the contract was or was not a maritime contract. If it was, the jurisdiction was asserted; if it was not, the jurisdiction was denied. And whether maritime or not maritime depended, not on the place where the contract was made, but on the subject matter of the contract. If that was maritime, the contract was maritime. This may be regarded as the established doctrine of the Court."

And it was held that the Admiralty Court had jurisdiction over policies of marine insurance.

Phoenix Ins. Co. vs. Erie & Western Transportation Co. Fed. Cases 11, 112, *Vol.* 19 *p.* 532.

In this case there was a shipment of grain brought from Chicago under contract of affreightment by which it was agreed that the Anchor Line of propellers should carry the grain to Erie, Pa., and there deliver it to the

Elevator Company for trans-shipment by rail to certain inland points in Pennsylvania. The bills of lading denoted a rate of freight charged for a continuous transportation service from the point of shipment to the inland points named.

Dyer, J., delivering the opinion of the Court, says at p. 534 on the question of jurisdiction:

> "It is true that the bills of lading denote a rate of freight for a continuous transportation service from the point of shipment to inland points in the States named; and to that extent they may be characterized as through contracts.
>
> "It is true also that part of this service was to be by rail but the service to be performed by the Anchor Line was to be exclusively on water."

After alluding to illustrations put by counsel for respondent as tests of admiralty jurisdiction and showing that they were more "ingenious than sound," he further says:

> "The true test of a maritime service or a maritime contract is whether it is to be substantially rendered on navigable waters. If it is, then it is of maritime character and the Court of Admiralty has jurisdiction; if it is not, then jurisdiction is disclaimed. That a very substantial part of the service to be performed under these contracts was to be performed upon navigable waters is not to be disputed. The loss happened upon these waters while such service was being rendered and under the construction of the contracts before given and by virtue of the principle last stated, I cannot doubt that a Court of Admiralty has jurisdiction of the subject matter of this suit."

Monteith vs. Kirkpatrick, 3 *Blatchford* 279 *Fed. Cases No.* 9721.

Judge Nelson said on appeal:

> "It is also objected that the District Court had no jurisdiction of the case so far as related to these charges as a portion of them were for the ship-

ment of the flour on the canal. These charges were for freight on Lake Ontario as well as on the canal. The contract therefore as respected the whole amount claimed by the libelants was in judgment of law an entirety, not severable and contains all the essential elements of a maritime contract. The shipment of the goods to which it related began and ended upon waters within the admiralty jurisdiction."

In the case cited the shipment was from Oswego on Lake Ontario, through the Erie Canal to New York City, and libelant claimed recovery for certain charges incurred at Albany and other points, which the respondents claimed were not of maritime character.

Dailey vs. City of New York 128 *Fed. p.* 796.

The question of jurisdiction was raised; Judge Adams says at page 798:

"Jurisdiction attaches in cases of maritime contract irrespective of the question of whether it is to be performed on land or on water, (citing many cases.)

IV.

THE BURDEN WAS UPON THE RESPONDENT TO EXCUSE ITS NON-PERFORMANCE OF THE CONTRACT OF AFFREIGHTMENT.

The libel alleges a contract of affreightment with Respondent, delivery of the goods in good order and condition upon Respondent's steamship at Philadelphia, and that the goods were delivered from Respondent's steamship in Portland in a damaged condition, and under such circumstances the burden of proving where and how the damage occurred was upon Respondent and not upon Libelant, no matter whether the libel sounds in tort or in contract.

The William Taber Fed. Cases 17957.

The rule is clearly and concisely stated in this case by Blatchford, Justice, as follows:

> "In case of loss or damage to goods covered by a bill of lading the presumption of the law is that such loss or damage was occasioned by the act or default of the carrier and the burden of proof is upon the carrier to show that it arose from a cause for which he is not responsible."

Clark vs. Barnwell, 12 *Howard* 130.

The Court says by Mr. Justice Nelson at p. 132:

> "And the main question in the case is, whether or not the damage in question was occasioned by one of the perils and accidents within this clause of the bill of lading? For, as the masters and owners, like other common carriers, may be answerable for the goods, although no actual blame is imputable to them, and unless they bring the case within the exception, in considering whether they are chargeable for a particular loss, the question is, not whether the loss happened by reason of the negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes, which, either according to the general rules of law, or the particular stipulation of the parties, afford an excuse for the non-performance of the contract. After the damage to the goods, therefore, has been established, the burden lies upon the respondents to show that it was occasioned by none of the perils from which they were exempted by the bill of lading, and, even where evidence has been thus given bringing a particular loss or damage within one of the dangers or accidents of the navigation, it is still competent for the shippers to show that it might have been avoided by the exercise of reasonable skill and attention on the part of the person employed in the conveyance of the goods; for, then, it is not deemed to be in the sense of the law such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty."

Propeller Niagara vs. Cordes 21 *Howard* 7.

In this case libels were filed in the District Court and

alleged breach of contract of affreightment, alleging that libelants caused certain goods to be shipped in good order and condition on board the Niagara, and that the master undertook and promised to convey the goods from the port of shipment to the port of destination in like good order and condition. That through the carelessness, negligence and improper conduct of the master, his mariners or servants, the goods became greatly damaged. The answer averred that the steamer was sea-worthy; that her cargo was properly stowed; denied negligence on the part of the master and his mariners; admit that the cargo was damaged, but allege that the damage was occasioned by a danger of navigation excepted in the bill of lading, and for which they ought not in any manner to be held responsible, and alleged that the vessel was stranded during a storm.

After discussing the liability of the carrier under these circumstances, Mr. Justice Clifford says, p. 28:

> "These authorities are sufficient, it is believed, to demonstrate the proposition, that where a loss or damage is shown, it is incumbent upon the carrier to bring it within the excepted peril in order to discharge himself from responsibility. It is not sufficient, without more, to show that the vessel was stranded, to bring the goods within the exception set up in the case * * * * "

And again at p. 29:

> "Losses arising from the dangers of navigation, within the meaning of the exception set up within this case, are not such as are in any degree produced from the intervention of man. They are such as happen in spite of human exertions, and which cannot be prevented by human skill and prudence. When such efforts fail to save the goods from the excepted peril, the ultimate loss and damage in judgment of law results from the first cause, upon the ground that when human exertions are found insufficient to ward off the consequences, the excepted peril may be regarded as continuing its

operation. Such, it is believed, is the nature of the contract between a carrier and shipper, so far as it becomes necessary to examine it in the cases under consideration. Carriers may be answerable for the goods, although no actual blame is imputed to them; *and after the damage is established, the burden lies upon the respondents* to show that it was occasioned by one of the perils from which they are exempted in the contract of shipment or bill of lading." (Citing authorities.)

The Edwin I. Morrison 153 *U. S.* 199.

In this case Chief Justice Fulier, delivering the opinion of the Court, says at p. 211:

> "Perils of the sea were excepted by the charter party, but the burden of the proof was on the respondents to show that the vessel was in good condition and suitable for the voyage at its inception and the exception did not exonerate them from liability for loss or damage from one of those perils to which their negligence, or that of their servants, contributed. (Liverpool Steam Co. vs. Phoenix Ins. Co. 129 U. S. 397-438). It was for them to show affirmatively the safety of the cap and plate; and that they were carried away by extraordinary contingencies, not reasonably to have been anticipated."

The Majestic 166 *U. S.* 375-386.

In discussing the same subject, the Court says at p. 386:

> "The question still remains, on the doctrine of implied exceptions, whether the injury here was by the act of God, for which the Company was not liable. The burden in this respect is on the carrier."

Cuming vs. The Baracouta 40 *Fed.* 498. (On appeal to Circuit Court, Southern District, N. Y.)

Libel for injury to cargo. The libelants shipped at New York upon The Baracouta, in good order, for transportation to Trinidad, Spain, certain casks and kegs con-

The New England, 110 *Fed.* 415.

A libel was filed in admiralty by a passenger to recover for loss of baggage. Lowell, District Judge, says:

> "In this case, the libelant, a passenger, delivered to the Dominion Steamship Company, at its dock in Boston, alongside the steamship New England, a trunk containing suitable wearing apparel for herself only. When she arrived at Liverpool the trunk was not to be found, but several days later was forwarded to the address she had left with the Company's agent at Liverpool. At the time she received the trunk its lock had been tampered with, and when that was forced the trunk was found empty. The Steamship Company, though pressed in correspondence by libelant, and though challenged in open court failed to explain the delay in delivery, or to introduce any evidence concerning the treatment of the trunk while detained in its hands. This failure of the libelee to introduce evidence within its sole possession justifies the court in finding that the trunk was broken open and rifled by the Company's servants, and that this fact became known to the managers. *Whether the conversion occurred in Boston, at sea, or in the British Dominions does not appear.*"

Southern Pacific Co. vs. Arnett 111 *Fed.* 849-852. (Circuit Court of Appeals, Eighth Circuit).

This was a case brought to recover damages for injuries said to have been sustained by cattle belonging to plaintiffs, while they were being transported by the defendant company over its railroad. Judge Thayer, delivering the opinion of the Court, says at p. 852:

> "The action was brought by the plaintiffs in the ordinary form, the complaint alleging certain specific violations of duty on the part of the carrier, by reason whereof the plaintiffs had sustained damage. The defendant answered, pleading the existence of a special contract, and such immunity from its common-law obligations as it had thereby secured. * * * * The point under consideration was not only not made below, but if it had been, we are aware of no rule of law which requires a

shipper who has made a special contract to declare upon it, when he contends that the carrier has been guilty of some negligence of duty on account of which he is liable, notwithstanding the provisions of the contract. A special contract, when exacted by a carrier is a defensive weapon, to be made use of by the carrier when sued by the shipper for any alleged dereliction of duty against which it was designed to afford protection."

Bancroft-Whitney Co. vs. Pacific Coast Steamship Co. Reported in 61 *Fed.* 213; 75 *Fed.* 74; 78 *Fed.* 155; 94 *Fed.* 180.

This case which has received so much consideration from the Courts in the Ninth Circuit seems to us to conclusively dispose of every contention here made or which can be made by appellant in the case at bar.

The case as reported in 61st Fed. was discussed by Judge Morrow, on exceptions to the libel. The libel was for damages arising out of breach of contracts of affreightment. At p. 214 Judge Morrow said:

> "The contracts declared on are contracts of affreightment entered into between the Pacific Coast Steamship Company and the shippers of the goods. It is a maritime contract, cognizable in the admiralty and this is sufficient."

The exceptions were overruled.

As reported in the 75th Fed. at p. 74, the case was again before the Court on a motion by the claimant for judgment in its favor after Libelants had rested their case. One of the grounds for the motion was that there was no testimony tending to show that the damage complained of was occasioned by the negligence of the carrier.

After setting forth the allegations of the libel, which are substantially the same as in the case at bar, and the averments and denials of the answer, and discussing the question of burden of proof, Judge Morrow says, at p 76:

"In this state of the pleadings, the following salient facts may be deemed established: (1) That the libelants' merchandise was shipped under the contracts of affreightment, or 'shipping receipts,' as they are termed, annexed to the libel; (2) that the merchandise was never delivered at the port of destination; (3) that it was returned to San Francisco and delivered to the shippers in a damaged condition; (4) that this damage was by reason of being wet with sea water; (5) that the fact that the vessel was leaking was discovered about eleven hours after the steamer sailed from San Francisco; (6) that the leak increased to such an extent that the vessel was compelled to put into Port Harford, and was there beached, about 17 hours after sailing from San Francisco. It may be observed, also, that there is a general denial that the merchandise was shipped in good order and condition. The following omissions in the answer are significant, in connection with the other averments and denials, and the established facts: (1) It does not appear from the answer what caused the ship to spring a leak. (2) There is no averment that the vessel, after sailing from San Francisco, encountered any stress of wind or weather to which the leak could be reasonably, or at all, attributed. (3) There is no averment in the answer that the cause of the damage was from a peril of the seas, or any other unavoidable accident.

"Such being the state of facts as disclosed by the pleadings, proctor for libelants contented himself with introducing the shipping receipts as evidence of the apparent good order and condition of the goods when delivered to the carrier for shipment. Bills of lading afford prima facie evidence that the merchandise was shipped in good order. (Citing authorities). He also introduced testimony respecting the damaged state, when returned to San Francisco, of one of the shipments. * * * * *

"The libelants then rested their case upon the admitted facts as stated and the supplementary proof referred to. Thereupon proctor for claimant moved for a judgment in his favor and in support of his motion contends that the libelants having failed to show that the merchandise was damaged through the negligence of the steamship company,

its officers and servants, and that they must first do this before the burden of proof is shifted on the carrier."

After citing Clark vs. Barnwell, 12 How. 272, the Court further said on p. 78:

> "In other words, the rule is that, when the merchandise has been delivered in apparent good order and condition to the carrier, and he delivers it to the consignee at the port of destination, or, as in this case, returns the goods to the shipper in a damaged condition, the presumption of law arises upon proof of delivery of the goods to the carrier in apparent good order and condition, and proof of damage to them, that it was in consequence of the negligence of the carrier; and the burden of proof of showing that the damage arose by one of the perils of the seas excepted in the contract of affreightment, or in some manner other than through the negligence of the carrier, is then cast upon the latter, and, when he has done this, the shipper or consignee still has an opportunity to show, in rebuttal, that, although the loss or damage occurred through a peril of the sea, still it might have been avoided, had the carrier used due skill, care and diligence. This rule appears to me just, logical and reasonable, and is constantly followed in cases of this character." (Citing many authorities.)

The case as reported in 78th Fed. p. 155 was the decision of the Court after hearing the proofs for claimants, and the Court again said, p. 168:

> "But, can it be said that the carrier, against whom a prima facie case of negligence has been made out, discharges the affirmative duty of bringing himself within one of the exceptions of the contract of affreightment by simply leaving the question as to whether or not the damage was caused by one of the excepted perils or dangers, in doubt? I think not. The carrier does not thereby overcome the presumption of negligence which the law raises against him. He cannot absolve himself from blame by merely showing such a state of facts that the court is unable to deduce how and in what

manner the damage has arisen. He must show affirmatively that the damage was caused by a peril of the sea or other cause excepted by the contract of affreightment, and this he must establish satisfactorily. He cannot leave the matter in doubt."

And again, at p. 170:

"The contention of claimant that the libelants having alleged negligence must prove it affirmatively, and that they cannot rely merely upon the prima facie presumption of negligence which the law raises upon proof of the return of the goods in a damaged state, is not tenable; for if this was so it would do away entirely with the prima facie presumption of negligence against the carrier; (citing Hall vs. Railroad Company 13 Wall. 272). It would therefore be enunciating a somewhat novel doctrine to say that a shipper is called upon to prove affirmatively that which, upon certain preliminary proof the law presumes against the carrier. I am of the opinion that the carrier has failed in his proofs to bring himself within the exception, claimed by him, of a peril of the sea."

Decree for Libelants.

In the case as reported in 94th Fed. on appeal to the Circuit Court of Appeals for the Ninth Circuit, in the opinion of Hawley, J., the Court says at page 195:

"In a proceedings of this character and under the facts established in this case, the following principles of law are well settled:

"(1) That common carriers by water, like common carriers by land are in the nature of insurers, and are liable for every loss or damage, however occasioned, unless it happens from the act of God, or the public enemy, or by the act of the shipper, or from some other cause or accident expressly excepted in the bill of lading." Niagara vs. Cordes, 21 How. 722-26; Hall vs. Railway Co. 13 Wall. 367-372.

"(2) That when merchandise is shipped, and the usual bill of lading given, promising to deliver the same in good order, the dangers of the sea excepted, and they are found to be damaged, the *onus*

probandi is upon the owner of the vessel to show that the injury was occasioned by one of the excepted causes. (Citing authorities.)

"(3) That, in every contract for the carriage of goods by sea, there is a warranty on the part of the ship owner that the ship is seaworthy at the time of beginning her voyage, and his undertaking to safely carry the goods cannot be discharged because the want of fitness in the steamer is the result of latent defects." (Citing authorities.)

"(4) That, although it may be presumed that a vessel is seaworthy when she sails, if soon thereafter a leak is found, without the ship having encountered a peril sufficient to account for it, the presumption is she was not seaworthy when she sailed." (Citing authorities.)

The Court after discussing the evidence and citing the rule laid down in "The Compta," says, p. 200:

"The broad statement is clearly made that it is the duty of the owner, in order to relieve himself, 'to show that the damage arose, from a sea peril.' It necessarily follows, that if such facts are known to him, he must prove them. 'It is not enough for him to show that it might have arisen from that cause. He must prove that it did.' If the facts are unknown to him then the other methods of proof suggested by Judge Hoffman may be resorted to—their sufficiency, of course, to be determined by the Court. Common sense and sound reason appeal strongly to the conscience of the Court, against the adoption of any rule that would allow the claimant to withhold the facts within his knowledge, and rely solely on the theory of presumptions."

The decree of the District Court in favor of Libelant was affirmed.

On Certiorari the case was reversed in 180 U. S. 49, S. C., 45 Law Ed. 419, but upon the single point that the stipulation requiring the claim for loss to be presented within thirty days was reasonable, and binding upon the shipper. None of the other points of the case were dis-

cussed, therefore, the rules above stated by the District Court and the Circuit Court of Appeals, stand as the law of this Circuit.

V.

THE LIBEL DOES NOT SOUND IN TORT.

Mr. Justice Daniel in *New Jersey Steam Navigation Company vs. Merchants Bank,* 6 *Howard,* discusses this class of cases extensively and says at p. 411:

> "They are cases in which a kind of quasi tort is supposed to arise from a violation of the contract immediately between the parties. These cases, although they are torts in form, are essentially cases of contract."

And again on p. 412, he says:

> "With respect to these cases *ex delicto quasi ex contractu,* as they have been called, it has been ruled, that if the plaintiff states the custom, and also relies on an undertaking, general or special, the action is in reality founded on the contract, and will be treated as such."

In *The Plymouth* 3 *Wall.* 20-34, cited in Appellant's brief the Court says at p. 34:

> "It has been strongly argued that this is a mixed case, the tort having been committed partly on water and partly on land; and that as the origin of the wrong was on the water, in other words as the wrong began on the water where the admiralty possesses jurisdiction, it should draw after it all the consequences, resulting from the act. These mixed cases, however, will be found not cases of tort, but of contract which do not depend altogether on locality as the test of jurisdiction, such as contracts of material men for supplies, charter parties and the like. These cases depend upon the nature and subject matter of the contract whether a maritime contract and the service a maritime service to be performed upon the sea or other navigable waters, though made upon land."

In *Pacific Queen* 94 *Fed. p.* 194, the Court says:

> "We are of the opinion that the proceeding is founded upon the contract of affreightment, and that the claim for damages is based upon the failure of the Steamship Company to deliver the merchandise in good order and condition, and that the averments in the pleadings as to the negligence are merely illustrative of the manner in which the goods were damaged. It cannot, it seems to us, be legally said that the mere mention of the word 'negligence,' as used in the pleadings, changes the character of the proceedings from one on a contract to one in tort."

The Court said at p. 193:

> "In action at common law the pleadings are to be construed strongly against the pleader, and often strictly, without regard to the real substance of the action; but in admiralty the rule is different. All Courts of Admiralty agree in regarding substance of more importance than form, in the proceedings which come before it; and therefore any process in admiralty is, in general, if not always, sufficient, which distinctly brings the substance of a case, and the actual parties, before a proper court in such way as to permit the questions of the case to be investigated, its merits ascertained and justice done."

In view of this statement of the Court it seems to us that the question of whether the libel sounds in contract or in tort, is purely academic.

In *Whittenton Mfg. Co. vs. M. & O. River Packet Co.* 21 *Fed.* 896, city by Appellant, the Court, says in the opinion at p. 899:

> "The action *ex delicto* is for a breach of duty founded on the custom of the realm, and it makes no difference that there is a contract by the carrier out of which the duty arises, unless there is something special in the contract upon which the plaintiff must rely for his action, in which case his suit necessarily must be *ex contractu*. In the ordinary

contract the plaintiff has his choice as to the form of action he will use; and where the action is *ex delicto* the carrier may plead in defense any stipulations of a contract which has relieved him from the alleged breach of duty. (Schouler, Bailm, 575; Hutch. Carr. 748).

"In New Jersey Nav. Co. vs. Merchants Bank, 6 How. 344, 381, the Court says: 'The general liability of the carrier independently of any special agreement, is familiar. He is chargeable as an insurer of the goods, and accountable for any loss or damage that may happen to them in the course of conveyance, unless arising from inevitable accident, etc.' Again: 'The burden of proof lies upon the carrier and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties which the law has annexed to his employment.'

"Mr. Hutchinson, in his able work, also discusses this subject, and states the difficulties, even under the old practice, of determining the proper form of action to be brought, and when brought, whether it be one or the other of the two forms allowable. He says that until Dale vs. Hall, 1 Wils. 281, the form of action was *ex delicto,* and that case decided that, even where it is on the contract, the declaration is the same in effect as if it had been upon the custom. (Hutch. Carr. 737 et seq.) He calls attention to the perplexities formerly existing in distinguishing one form of action from the other and says: 'The declarations of the two kinds of actions, according to approved formulas, were so nearly alike, that in many cases the astutest judges became perplexed in their efforts to find out to which class the declaration belonged.' "

Therefore, whether the libel be construed as sounding in tort or in contract makes no difference as to where lays the burden of proof. In either case, delivery of the goods to the carrier in good order and condition, and delivery of the goods by the carrier damaged, raises the presumption of his negligence, and casts upon him the burden of relieving himself therefrom.

VI.

THE PRESUMPTION IS THAT THE DAMAGE OCCURRED WHILE THE GOODS WERE IN RESPONDENT'S POSSESSION.

The rule is thus stated in 6 *Cyc. p.* 490-491, and citing an abundance of authorities in the notes to support the proposition:

> "Under the American rule that, in the absence of partnership relations or contract for through transportation, each of the carriers is alone liable for loss or damage occurring during his part of the transportation, the action may be brought directly against the carrier on whose line the loss or injury occurred. To render the first carrier liable it must appear that he failed to deliver the goods to the connecting carrier, or delivered them in a damaged condition. The second or subsequent carrier is not to be held liable in an action against him until it appears that he received the goods in sound condition and that loss or injury happened to them while in his possession. But on proof of delivery to the first carrier in good condition and receipt by the second carrier without objection, it will be presumed, in an action against the second carrier that the goods were still in the condition in which they were received by the first carrier. Indeed the weight of authority seems to be in support of the general proposition that if the goods are delivered by the last carrier in a damaged condition the presumption arises without further evidence that the damage occurred while in the possession of the last carrier, and the burden is upon him to prove that they were in a damaged condition when received by him, the double presumption being entertained that they were accepted in good condition by the first carrier, and that such good condition continued until their receipt by the last carrier, notwithstanding transportation over intermediate lines."

Applying these rules to the case at bar, the case stands thus: The record shows that the goods were delivered to Respondent's steamship "MILLS" at Philadelphia in good

condition; that the goods were delivered by Respondent's steamship "STANLEY DOLLAR" in a damaged condition. No objection having been made by the "STANLEY DOLLAR" to the condition of the goods when received by it at the Isthmus of Panama, the presumption therefore arises that the goods were damaged while on board the "STANLEY DOLLAR," and the burden was therefore upon the Respondent to explain away this presumption. This it failed to do. The legal presumption therefore is sufficient to sustain the decree, and the admiralty jurisdiction, and the decree should be affirmed, with costs.

Respectfully submitted,

JESSE STEARNS,

JOHN H. HALL,

Counsel for Appellee.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA-ATLANTIC STEAMSHIP COMPANY, a Corporation,
Respondent-Appellant,

vs.

CENTRAL DOOR AND LUMBER Company, a Corporation,
Libelant-Appellee.

No. 2116

Reply Brief for Appellee

STATEMENT.

After the service and filing of the brief by Malarkey, Seabrook & Scott, proctors for respondent, Denman & Arnold, of counsel for appellant, filed a "supplemental brief" so called, and the appellee in reply to the "supplemental brief," presents the following additional argument and authority:

In the supplemental brief appellant discusses the statements in the libel, paragraph seven, p. 7 of the rec-

ord, that "respondent neglected to insure said shipment and to deliver insurance policies to libelant; and respondent has failed to collect and pay, or cause to be paid, any insurance to libelant on account of the said loss or damage, although libelant paid respondent certain sums for which respondent presented bills as insurance premiums."

There is no allegation in the libel that respondent agreed to procure insurance and no claim is made in the libel for damages against respondent for failure to insure the goods, nor any claim for return of the insurance premiums paid by libelant to respondent. The allegations in respect to insurance merely go to show the careless and negligent non-performance, by respondent, of its agreement. Either respondent procured insurance, or was guilty of obtaining money under false pretences by presenting bills for obtaining such insurance. The allegation in the libel is that "respondent neglected to deliver insurance policies to libelant," although the premiums were paid therefor to respondent. As the record stands it appears that the respondent did procure insurance, and therefore all the argument based upon the point that an agreement to procure insurance is not a maritime contract falls, because no such agreement is alleged, and because insurance was procured; moreover, respondent having rendered bills for insurance premiums and having received payment thereof by libelant, is estopped from saying that there was nothing but a contract to procure insurance. So far as the relations between libelant and respondent were concerned, libelant was a double insurer; it had made itself an insurer by

its own agreement and receipt of insurance premiums; and it is an insurer as a common carrier.

The supplemental brief also discusses the rule of dagames at p. 6 et seq. of the brief. In the eighth paragraph of the libel (record p. 7), the allegation of damage is followed by these words, "including the freight, insurance and other charges, paid to respondent by libelant, after deducting all allowances for salvage, on the goods shipped." These words may be regarded as surplusage and are to be construed as though libelant had said "including cost of raw material, labor and cost of manufacture"; in other words, the damage caused to an owner of goods by their destruction covers all elements that go to make up the value at the time they are destroyed, and necessary freight, insurance, or any other item that goes to make up the cost of goods may be considered in computing the amount of damage sustained, and it is clear from the reading of the decree following the allegation of damage in the libel, that the decree was rendered for the damage to the goods sustained by libelant, and there is nothing in the record to show that the rule of damage or the computation by the Court was erroneous.

The supplemental brief also bases an argument on a clause in the bill of lading that "all liability under this bill of lading shall be estimated on the basis of the actual market value of the goods at the place and time of shipment." As shown by the brief for appellee already filed, the respondent is not entitled to the benefit of any stipulation in the bills of lading, not having spe-

cially pleaded it. Any matter of excuse or in mitigation of damages must be specially pleaded by the respondent in order to be of any benefit or avail to it, and as we have already shown, the bills of lading are not entitled to be read into the record, being only a fragment of the proof offered in the District Court, and being offered for the special purpose of showing receipt of goods by respondent at Philadelphia, in good order and condition.

We also desire to again call the Court's attention, (this Court now sitting as a Court of Error in this case), to the assignments of error, p. 21-26. There is no assignment of error in regard to the increase of the damages claimed in the libel, and it is now too late to urge that as a ground of reversal.

Admiralty Rule 29 provides: "If the defendant shall omit or refuse to make due answer to the libel upon the return day of the process, or other day assigned by the Court, the Court shall pronounce him to be in contumacy and default; and thereupon the libel shall be adjudged to be taken pro confesso against him, and the Court shall proceed to hear the cause ex parte, *and adjudge therein as to law and justice shall appertain.*"

Now, the respondent having appeared in the cause and filed its stipulation, had submitted itself to the jurisdiction of the Court, and upon the proof offered it cannot be doubted that the Court had the power to render a decree for a less amount than was claimed in the libel, if the proof failed to show the full amount of damages; on the other hand, there would seem to be no doubt if the proof showed a greater amount of damage (the

cause of action not having been changed), than was alleged in the libel, upon motion to make the allegation of damage conform to the proof, would have like power to amend the libel and render judgment for the amount of damage the proof showed the libelant had sustained. We therefore contend that the amount and rule of damage, like the matters excusing non-performance of the contract of affreightment were matters of defense, and the burden was on respondent to introduce by proper allegations in its answer, any matters which tended to mitigate or lessen the amount of damage claimed by libelant, and having failed to do so, and it not appearing from the record that any error was committed by the Court below, it is too late for the respondent to have the matter now considered.

We also claim that the question of insurance has no relation or bearing upon the question before this Court, which is simply one of jurisdiction.

POINTS AND AUTHORITIES.

I.

The Trial Court had power to amend the libel in respect to the amount of damage alleged.

U. S. Revised Statutes Sec. 954.
Admiralty Rule 29.
McDonald v. Nebraska 101 Fed. 171, 176-178.
Stockton v. Bishop, 4 How. 155-168.
Parks v. Turner 12 How. 39-46.
Tilton v. Cofield, 93 U. S. 163-166.
Bamberger v. Terry 103 U. S. 40-43.
Hardin v. Boyd, 113 U. S. 756-761.

II.

Error not assigned will not be considered in this Court.

Bell v. Union Pac. R. Co., 194 Fed. 366.
Toledo, etc., R. Co. v. Hove, 191 Fed. 776-781.

III

If this Court should hold that it was error to amend the libel in respect to damages, the judgment should not be reversed, but the Court below directed to enter judgment in accordance with the prayer of the original libel.

Mobile & M. Ry. Co. v. Jurey III U. S. 584-596.
Pacific Postal Telegraph & Cable Co. vs. Fleischner, 66 Fed. 899, 900. (Circuit Court of Appeals, Ninth Circuit).

IV.

Even if the libel had alleged a contract to procure insurance, it would not have ousted admiralty of jurisdiction.

Rosenthal v. The Louisiana 37 Fed. 264.
The Oceano, 148 Fed. 131-132.
Kaiser vs. Blue Star Steamship Co., 91 Fed. 267, 270-271.
Nash v. Bohlen, 167 Fed. 427.

V.

The measure of damages in an action against a common carrier for loss of goods in transit is their value at point of destination with legal interest.

Mobile & M. Ry. Co. vs. Jurey III U. S. 584.

I.

The Trial Court had power to amend the libel in respect to the amount of damage alleged.

As to the power of the Court to amend, we draw Your Honor's attention to the opinion of Judge Caldwell in McDonald vs. Nebraska, supra, on p. 176, 177, 178 and 182 of the Opinion. He says at p. 182:

> "What is meant by substantial right is a right going to the actual merits of the case. Such a right is not acquired by a mistake or error in pleadings which has not misled the other party to his prejudice. And the prejudice must be actual and irreparable, and not merely theoretical. At this day the party who seeks to profit by an error or mistake in pleading must be able to invoke the principle upon which the law of estoppel is founded."

In the case at bar, there was no change in the cause of action. The amendment would have been allowed as a matter of course upon the trial in case of a contest. Where unliquidated damages are sought to be proved, the *ad damnum* may be increased either before proof is offered, or after proof is in, to make it conform to the proof.

As Judge Caldwell says in the case cited (p. 177): "Under Sec. 954 of the Revised Statutes, the right of amendment extends to the 'sumomns, writ, declaration, return, judgment and other proceedings in civil causes in any court of the United States,' and may be exercised at any stage of the case, even after trial and judgment."

The cases cited by counsel for appellant on p. 29 do not support his contention.

Ruth vs. Smith, 68 Pac. 268 (Col).

Under the Colorado statute judgment cannot be rendered on default for more than is demanded in the complaint, and in the case cited, the judgment was rendered for more than was claimed in the complaint, and no proof was taken to sustain the judgment.

Russell vs. Shurtliff, 65 Pac. 27 (Col.)

No proof was taken in that case on the default, and the complaint showed that only a several judgment could be entered, and the judgment entered was joint, and it was held the Court had no jurisdiction to render a judgment for different relief than the complaint demanded.

Seltzer vs. Davenport Co., 49 Atl. 852. (Conn.)

The complaint alleged negligence in not furnishing safe machinery and the proof taken on the default showed that the machinery was safe, but that the plaintiff had not been properly warned, and the Court held that for negligence not charged in the complaint no substantial damages could be awarded.

Johnson vs. Matz, 27 N. W. 467 (Iowa.)

An unliquidated amount was alleged to be due, and judgment was entered for a fixed amount, with no proof taken to support it.

In *Ohio Central Railway Co. vs. Central Trust Co.,* 133 U. S. 83, the principal of certain railroad bonds was decreed to be due but the bill contained no averments, nor did the record show that they were in fact due, and

at p. 91 the Court said, after quoting from Thompson vs. Wooster (114 U. S. 104): "If the allegations are distinct and positive they may be taken as true without proof, but if they are indefinite, or the demand of the complaint is in its nature uncertain, the requisite certainty must be afforded by proof."

In *Thompson vs. Wooster,* 114 U. S., at p. 111, Justice Bradley quotes with approval the statement made in Williams vs. Corwin, Hopkins Ch. 471:

> "When the allegations of a bill are distinct and positive, and the bill is taken as confessed, such allegations are taken as true without proofs," and a decree will be made accordingly; but "where the allegations of a bill are indefinite, or the demand of the complaint is in its nature uncertain, the certainty requisite to a proper decree must be afforded by proofs. The bill, when confessed by the default of the defendant, is taken to be true in all matters alleged with sufficient certainty; but in respect to matters not alleged with due certainty, or subjects which from their nature and the course of the court require an examination of the details, the obligation to furnish proofs rests on the complainant."

In *Davis vs. Speiden,* 104 U. S. 83, the facts are not stated, but the Court says, p. 83:

> "We think with the Court below that on the merits it presents a case for reversal, because the averments in the original bill were not sufficiently precise and definite to warrant a decree such as was rendered, *without proof.*"

The point decided, however, was whether a bill of review should be dismissed because the decree had not been performed.

U. S. v. 650 Cases Tomato Catsup, 166 Fed. 773.

The Court says at p. 775:

> "Though the claimant has not answered or contested the allegations of the libel, so that it may be taken pro confesso, yet it is the duty of the Court, before entering a decree of condemnation in spite of such confession by default, to see that a case is made out."

The Court cited the 29th Admiralty Rule, *Thompson vs. Wooster* and *Ohio Central Railway Co. vs. Central Trust Co.* The allegations of the libel not being sufficient to make out a case without proof, the case was held for hearing in support of the libel; thus impliedly holding as contended by counsel for appellee, that the Court may, upon the hearing, render such decree "as to law and justice shall appertain."

In *Confiscation Cases* 20 *Wall,* 92, cited by counsel for appellee on another point, the Court says at p. 108:

> "To a citation or monition founded on the information, default was made. What the effect of this default was we do not propose now to discuss at length. We have gone over the ground recently in the case of Miller vs. U. S. (11 Wall. 268), and to that case we refer. In view of what was said there and decided, and in view of the authorities cited, it must be held that the default established the truth of all the material averments in the information, and among others that there had been an executive seizure before the information was filed. It was equivalent in effect to a confession. Now, while it is true, a party cannot, by consent, confer jurisdiction where none would exist without it, it is equally true that when jurisdiction depends upon the existence of a fact, its existence may be shown as well by the confession of a party as by any other evidence."

Again, at p. 110:

"An information was filed, called a libel of information it is true, but still an information, a citation as well as a monition was issued, a default was taken and after consideration of the evidence condemnation was adjudged. * * * * What matters it then that the information was called a libel of information, or that the warrant and citation is called a monition? The substance and all the requisites of a common-law proceeding are found in the record. Technical niceties are not required in admiralty or revenue cases."

Again, at p. 112:

"The Court did proceed to hear and determine the case after the default was entered. And it was not until after such hearing and consideration that the property was condemned. This appears by the record. Having heard and considered evidence, it must be presumed the Court found that the property belonged to a person engaged in the rebellion, or one who had given aid or comfort thereto, as well as all other facts necessary to the rendition of the judgment. This is a presumption always made in support of judgments of courts after their jurisdiction is made to appear. No rule of law required the District Court to state in detail in its record its findings of fact, and no such practice has prevailed in any Court, except some which are both of limited and inferior jurisdiction. *Nor is it to be considered in a Court of error whether the evidence was sufficient to warrant the findings presumed to have been made, and without which the judgment could not have been given. A less degree of evidence is certainly needed after a default.*"

II.

Error not assigned will not be considered.

Bell v. Union Pac. R. Co., 194 Fed. 366. (Circuit Court of Appeals, Eighth Circuit).

Lays dawn the rule in the syllabus as follows: "Assignments of error cannot be reviewed where they call in question certain alleged erroneous holdings not shown by the record."

Toledo Etc. R. Co. v. Howe, 191 Fed. 776. (Circuit Court of Appeals, Sixth Circuit).

The Court says at p. 781: "The Circuit Court of Appeals for the Seventh Circuit, in applying Rule Eleven of Circuit Courts of Appeal, disregarded assignments of error that the judgment was contrary to the law and contrary to the evidence, because they did not specify wherein the judgment was contrary to the law and contrary to the evidence."

The questions sought to be raised in appellant's supplemental brief regarding the amount and measure of damages, the amendment of the libel to conform to the proof, the insurance and certain clauses in the bill of lading, nowhere appear in appellant's assignment of error and should not be considered by this Court sitting as a court of error, which it must do in this case because the evidence is not before it, and therefore the cause cannot be tried de novo but only upon error assigned which appears upon the face of the record.

III.

In any event the judgment should not be reversed, but the Court below should be directed to enter judgment for the smaller amount.

In Pacific Postal Telegraph & Cable Co. v. Fleischner, 66 Fed. 899, the Court says, at p. 910:

> "As the amount in which the judgment is defective can be clearly ascertained from the findings and the judgment itself, I see no reason for reversing the judgment in toto and sending the cause back for new trial. In such cases the Court may direct the Circuit Court to enter such judgment as should have been entered under the pleadings and findings."

It is true in this case that the Court said it would have been improper to give judgment for more damages than were demanded in the complaint, but it must be borne in mind that the case cited was a law case, and under the Statute the practice of the State Courts are to be followed, and it must also be borne in mind that in the case at bar, a motion was made to amend the libel to conform to the proof.

In Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584, the Court says at p. 596:

"Conceding that the charge in respect to the rate of interest was erroneous, the judgment should not be reversed on account of the error." Citing Lincoln v. Claflin, 7 Wall. 132.

IV.

As to the statement in the libel in regard to insurance being sufficient to oust the Court of jurisdiction, we call attention to *Rosenthal vs. The Louisana, Supra,* where the Court said at p. 265:

> "As to jurisdiction there seems to be no doubt. As the main contract (and the basis of the ship's liability) is a maritime contract, the additional stipulation as to insurance while the goods lay on the wharf cannot oust the jurisdiction."

In this case the District Judge found that there was a contract by which respondent agreed to insure the goods.

In The Oceano, 148 Fed. 131, cited by appellants in their brief, Judge Hough says at p. 132:

> "Whether the settlement at Kobe be regarded as an overpayment by libelant, or an underpayment by the claimant, the fact remains that the claimant procured an advance of its chartered freight, promised by its charter party to repay it, and has persistently refused to do so. In my opinion, therefore, this is really a cause of affreightment, and admiralty has jurisdiction of all contracts of affreightment though the damages may be in any case somewhat indirect."

The counsel for claimant objected to the jurisdiction, claiming that the libelant was suing for money had and received. The Court, however, upheld the jurisdiction.

Nor is the case of Turner vs. Beacham, Fed. Cases 14,252, cited by appellant, in point. This was a libel for services and materials furnished in building a vessel, mingled with a contract to become a partner in the company to purchase the vessel after it was built. The answer set up the contract, showing the two things to be intermingled, and manifestly the court of admiralty had no jurisdiction, but it was a case for equity.

Keyser v. Blue Star Steamship Co., 91 Fed. 267.
(Circuit Court of Appeals, Fifth Circuit.)

In this case the objection was made that it was not within admiralty jurisdiction. The Court says at p. 271:

'The answer shows that almost if not all of the foreign trade at the port of Pensacola is in timber and lumber, by chartered foreign vessels, with reference to which business foreign exchanges are almost exclusively made, and made by means of master's drafts payable to their own order, and signed and endorsed by them, on the owners of their vessels or buyers of the cargo, which are given and received at the rate at the time current; and, there being no market for them at Pensacola, they are sent on for collection. Such being the case, it may very well be that the libelant would have refused to charter the ship except upon the condition that the charterer would make and agree to observe stipulation 7, as expressed in the charter party. It is true that the mere fact of this agreement being embraced in the charter party would not of itself give it the character of a maritime contract; but its relation to the other stipulations of the charter party may be such (and, we think, appears to be such) as to connect it with the contract into which the parties were entering, a contract of an undisputed maritime character, and in such a manner as to authorize the parties to apply to a court of admiralty to inquire into any alleged breaches of this stipulation." Citing *Insurance Co. vs. Dunham,* 11 Wall. 1-36.

Nash vs. Bohlen, 167 Fed. 427.

Held That an agreement by a carrier to insure cargo where it is one of the elements of a properly maritime contract of affreightment, may be proved in admiralty and damages recovered for its breach in a suit for other breaches in the contract.

V.

The measure of damages in an action against a common-carrier for loss of goods in transit is their value at point of destination with legal interest.

Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584.

The Court at p. 596 lays down the rule as stated.

Therefore, the libel correctly specified the measure of damages in Article VI of the libel.

The case cited is also instructive upon the point that the contract is not necessarily embraced in the bill of lading issued by the carrier, where another contract is proved, either written or oral.

Therefore, upon the authorities cited, we contend that the judgment of the Court below should be affirmed, with costs.

Respectfully submitted,

JOSSE STEARNS,
JOHN H. HALL,
Counsel for Appellee.

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No. 2133

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CALIFORNIA-ATLANTIC STEAMSHIP COMPANY (a corporation),

Appellant,

vs.

CENTRAL DOOR & LUMBER COMPANY (a corporation),

Appellee.

APPELLANT'S REPLY BRIEF*

I.

Jurisdiction is not Presumed on Appeal to Support the Decree. On the Contrary, Absence of Jurisdiction is Presumed.

Appellee argues at page 9 of his opening brief, as follows:

> "The decree having been taken pro confesso the presumption is that all the facts necessary to warrant the decree have been properly found, *IF they are substantially averred in the libel.*"

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*In this case appellant has filed three briefs, its original, a supplemental (green) brief, and this reply to appellee's two briefs —"opening" and "reply".

While this unqualified statement is too broad, we are willing to admit it true for purposes of argument. But it gains our opponent nothing. The very question at issue is: Were the jurisdictional "facts substantially averred in the libel"?

As we have pointed out in our supplemental brief, at page 22, the federal courts of appeal will not only not presume jurisdiction for the decree, but, on the contrary, will presume it does not exist and raise the question on their own motion if not suggested in the assignments of error or argument of counsel.

II.

Inferences of Jurisdictional Facts From Other Facts Pleaded Are Not Sufficient to Confer Jurisdiction.

It is of course apparent that jurisdiction to take the *default* in this case must appear in the libel. That is to say, anything shown at the hearing *after* the default and in the absence of the defaulted party, cannot then *create* a jurisdiction. The decree *pro confesso* is only for so much as is in the libel. The defaulting party *confesses* nothing not there pleaded. And this is *a fortiori* true of jurisdictional matters.

U. S. v. Tomato Catsup, 166 Fed. 773;

Ohio Cent. Ry. Co. v. Central Trust Co., 133 U. S. 83;

Thompson v. Wooster, 114 U. S. 104;

Wong Him v. Callahan, 119 Fed. 381.

It therefore follows that in determining the jurisdictional questions here involved, the proofs taken are not before the court. If the court had no jurisdiction for the default, it could not have a hearing and what transpired at any form of hearing is of no avail. And likewise, a failure to bring up the evidence would not raise any presumption of *jurisdictional* fact to support the decree. It is to the libel alone that we must look to determine the court's jurisdiction.

The libel avers that the goods were "to be transported in said steamer and connecting lines and steamers to Portland, Oregon". "That libelant's loss was occasioned solely by the negligence and misconduct of the respondent, its employees, agents or servants."

There is nothing in the libel to show these "connecting lines" were not in fact run by respondent. And even if the court were to take judicial notice that there is only one railroad across the Isthmus and further, that that one road is run by the Panama Railroad Company, a private corporation, in which the United States Government owns a large block of stock —even if the court could go this far, it could not take judicial notice that the Panama Railroad Company was not the "*agent*" or "*employee*" of the respondent in carrying over the connecting line.

As the libel does not show *affirmatively* that these agents and employees whose negligence caused these injuries were not *land* agents, or that their negligence

was not on land, the jurisdiction does not appear, and the decree cannot stand.

But let us go further, let us even suppose that the court will take judicial notice (against the facts, as we understand them) that the Panama Railroad Company had no arrangement with appellant by which it became its agent or employee to carry over the "connecting lines", across the Isthmus, but that on the contrary, it carried as a separate carrier, as an independent contractor. Can the court take further judicial notice that the appellant itself did not stow the goods in the cars of the railroad at Ancon, or break bulk and take the goods at Balboa, and that the negligent acts of stowage and handling occurred during these incidents to the land carriage?

In determining whether the libel shows jurisdiction, the presumption, according to the Supreme Court, is the contrary. It will presume *against* the jurisdiction that after the goods were in the cars the "connecting" carrier carried as the agent or employee of appellant, and that the negligence occurred on land, rather than on shipboard.

The appellee urges that the court will infer that where there are connecting carriers, the *last* carrier is responsible. This may or may not be true, but it is no warrant for the proposition that the *last carrier* and the *last instrument* of carriage are the same. So far as the libel shows, there is but one carrier, who is to carry by steamer and then by connecting lines and steamers from Philadelphia to the Isthmus, across the Isthmus to the Pacific, and thence to Portland.

However, even if this were the proper inference for the court to make, it does not take the *place of the averment of jurisdictional facts* themselves as to the locus of the tort, or, if a case of contract, as to the part of the contract which was broken. The court cannot infer the jurisdictional facts from other facts not in themselves stating the jurisdiction.

Chief Justice Marshall states the proposition in the following words:

> "The decisions of this court require that the averment of jurisdiction shall be positive; that the declaration *shall state expressly the fact on which jurisdiction depends.* It is not sufficient that jurisdiction may be inferred argumentatively from the averments."
>
> *Brown v. Keene,* 8 Pet. 112, 115;
>
> *Robertson v. Cease,* 97 U. S. 646 at 649.

> "The rule is without exception that the facts upon which the jurisdiction of the courts of the United States rests must appear in the record of all suits prosecuted before them. Ex parte Smith, 94 U. S. 455 (24:165); Metcalf v. Watertown, 128 U. S. 586 (32:543). The general averment in this bill that 'the amount or value in controversy in this suit exceeds the sum of $2000, exclusive of interest and costs' was a mere conclusion and that it was nowhere shown that the amount of any one of these distinct county assessments, the collection of which was entrusted to these tax collectors, exceeded that sum, while, on the contrary, the total valuation of the property of the telegraph company assessed as belonging to or operated by it in any one county was such as to preclude the idea that the amount of the assessment in such county would approach $2000."
>
> *Fishback v. Western Union Tel. Co.,* 161 U. S. 96 at 100.

It is therefore submitted that the appeal must be sustained as the libel does not state facts showing admiralty jurisdiction.

III.

Appellee Has Sought the Wrong Tribunal.

Appellee claims that, as the goods were in the possession of the appellant, it cannot tell where the alleged negligence occurred, and seems to seek sympathy on this account.

This claim is simply an admission that it has chosen the wrong tribunal. It is asking relief in admiralty, in a court of limited jurisdiction, with the frank statement that it does not know whether the facts bring it within those limits.

This appeal might have more weight if there were no federal or state common law courts having jurisdiction of the entire transit of the goods, whether by land or water.

In this connection, it should be noted that the presumptions *against* federal jurisdiction apply *a fortiori* in admiralty where the defendant is not only deprived of its right to defend in the state courts, but is also deprived of its right of trial by jury.

IV.

The Carriage Across the Isthmus is a Substantial Land Journey in so far as Concerns Loading, Stowing, Handling and Carrying.

This point was not seriously opposed at the hearing, but it may be as well to point out that the trip from Blanco to Moss Landing held a land carriage though joined to a sea carriage in the case of *Pac. Coast SS. Co. v. Ferguson,* 76 Fed. 993, was less than 25 miles.

Would the court have awarded a decree for the libelant in that case if the water carriage instead of being from Moss Landing to San Diego, had been to Liverpool, around the Horn?

Would the locus of the tort of negligent stowage in the cars at Blanco have been any more maritime because the subsequent voyage at sea was 8,000 miles instead of 400?

Counsel has cited the case of *New Jersey Steam Nav. Co v. Merchants Bank,* 6 Howard 344, in which it affirmatively appears that the damage to the goods occurred on Long Island Sound, that is on tide waters. This decision is authority for the proposition that admiralty will take jurisdiction of a breach of that portion of the contract of affreightment which is upon the high seas, but is in no sense an authority for the assumption of jurisdiction over a breach of contract for a carriage by railroad over land as part of the total through journey.

This case was decided before the case of the *Genessee Chief,* 12 Howard 443, and during the period when the federal courts were seeking some excuse to break down their earlier holding that they would not take jurisdiction of water carriage above the action of the tide. The want of logic in these earlier cases is discussed and the question finally disposed of in the *Genessee Chief,* where the Supreme Court assumes jurisdiction of torts in navigable waters above tidal action.

Counsel has clearly misunderstood the language in *The New England,* 110 Fed. 415. In that case the goods were delivered to the Steamship Company at its dock, alongside its steamer, lying in the port of Boston, and the contract was to deliver them at Liverpool, Great Britain. The possession alongside the vessel is a maritime possession, incidental to its carriage in the vessel. It is true that the custody agreed on was at and from Boston, in the jurisdiction of Massachusetts, across the sea to Liverpool, in the British Dominions, but it was all a maritime custody, whether at the port of Boston or the port of Liverpool.

Bulkley v. Naumkeag etc. Co., 24 How. 386.

We have not been able to discover a case in any court in which it has been held that admiralty had jurisdiction for the *breach* of a contract to *carry* on a railroad, on *land,* where the contract also agreed to carry over water, and we confidently assert that there is nothing in the books that even remotely disagrees from the doctrine *laid down in this court in Pac. Coast SS. Co. v.*

Ferguson, or by the Seventh Circuit in the *Richard Winslow,* 71 Fed. 426.

As the libel is cast in tort, these cases on contracts of affreightment have no application in any event.

V.

In View of the Clerk's Certificate, the Apostles Must Be Deemed to Show all the Proceedings at the Hearing on Default.

We have before shown that jurisdiction for the default must appear from the libel at the time default is taken, and that it cannot be created by evidence or amendments taken thereafter. The proceedings at the hearing are, however, pertinent to show other errors in the decree.

Even if the evidence at the hearing could create the jurisdiction, the apostles show that no evidence was offered as to the locus of the negligence, but, on the contrary, it shows an agreement to carry by railroad for a long way before arriving at Philadelphia. The clerk has certified a "true transcript of the record *and* pro- "ceedings in said cause" * * * "which embraces all "the proceedings" (Apostles p. 28). He certifies that the bills of lading and letters (libelant exhibits, 1 to 9) were offered in proof by libelant and admitted in evidence by the court at the hearing of the above entitled cause (Apostles p. 39).

The true transcript of the record embracing *all* the "proceedings" at the hearing, thus shows that the *only evidence offered* was the bills of lading and the letters. None of these show the locus of the negligence.

The record shows no limitation of the purpose for which the bills were introduced. Counsel contends that they were for the purpose of substantiating the libel's averment that they were received by the steamer "Mills" at Philadelphia. This cannot be so, however, as they show receipt of the goods by railroad at Toledo, Ohio, Maurer, N. J., York, Pennsylvania, and the Panama Railroad Company at New York. Only one (Exhibit 6) shows a receipt of a part of the goods at Philadelphia, and that does not show that the goods were received by the steamship "Mills".

It is not for us to speculate what the libelant had in mind when it put them in evidence, but in any event they show:

(1) That if they were received by respondent at these inland points, the transportation was not maritime at its inception, as well as at Panama, and

(2) That the goods were received under an agreement that the damages for which the carrier became liable were to be limited to the value at the place of shipment.

Supplementary Brief, (Green Cover) pp. 26, 27.

It is elemental that if the proofs at the hearing *on default* contradict the libel, judgment will not be entered for the libelant.

The libel alleges valuation for damages at Portland, the proofs show an agreement for damages based on the place of shipment, i. e., in Ohio, New Jersey, Pennsylvania and New York. One cannot recover damages on a contract by showing of values at a place so distant and a time so remote from that agreed upon.

That the bill of lading may be at once a receipt and contract has been many times decided.

Pollard v. Vinton, 105 U. S. 7;

Iron Mountain Ry. v. Knight, 122 U. S. 79, at p. 87.

That the bill given by the original carrier (as here those railroads at these inland points) governs the carriage as to subsequent carriers (as here the California-Atlantic Steamship Company from Philadelphia to Portland) has been recently held by this court in the First Circuit.

Cobb v. Brown, 193 Fed. 958.

That when the court sits in a default case it calls for the highest good faith on the part of those seeking to gain a decree against an absent litigant, needs no emphasis. The rule is plain, the court must "adjudge as to law and justice shall appertain". It would be a mockery of justice to allow this decree to stand in the face of the proof offered by libelant itself that the court had before it no measure of damages under the contract under which the goods were shipped.

It further appears that the damages are unliquidated. Evidence is required to show their amount, and a mere

allegation in the complaint will not sustain the judgment on appeal.

Raymond v. Danbury Co., 20 Fed. Cases 332;
U. S. v. White, 28 Fed. Cases 588.

It is therefore submitted that no damages are shown at all on which to base the decree.

VI.

The Failure to Procure Insurance for the Goods on a Trip Across the Isthmus or to Repay Premiums.

Whatever may be said about the allegations of an agreement to insure, there is in the libel a clear cause of action for failure to return insurance premiums. The libels aver the receipt of the moneys by the respondent, the failure to insure, and includes the amount of the premiums in its claim for damages.

The claim of the libelant in this court that its intention in setting out this cause of action *to insure* so fully was merely to show negligence in performing an agreement *to carry,* displays a *naiveté* that is admirable. At any rate, it did not succeed in embodying its intent in the libel and if it had it would have been bad pleading even in admiralty. It is a safe wager also that if there were any other evidence taken at the hearing, it included the amount of the premiums.

There is nowhere any allegation in the libel that this insurance was for the *marine part* of the voyage only.

It may well have been and probably was, an agreement covering risks of carriage across the Isthmus. Now, a premium for insurance that is both non-maritime and maritime cannot be recovered in admiralty. All the authorities we have before cited on the other jurisdictional questions sustain this proposition.

No case is clearer than the *Pacific Coast SS. Co. v. Ferguson,* where this court, in comment on the *Richard Winslow* presupposes the exact case here presented.

> "The court dismissed the libel, upon the ground that the portion of the contract which provided for storage after the arrival of the vessel at her port of destination was not maritime, and was not cognizable in the admiralty. In that case the consideration was not apportioned to the two services which were to be rendered by the vessel. It was entire. *It is directly deducible, from the conclusions arrived at by both the courts, that, had the libel been brought by the owners of the vessel to recover the freight money under the contract, it would have been dismissed for want of jurisdiction, upon the ground that it was not based wholly upon a maritime contract.* A similar doctrine was applied in The Pulaski, 33 Fed. 383; The Murphy Tugs, 28 Fed. 429."
>
> *Pacific Coast SS. Co. v. Ferguson*, 76 Fed. 993, at 996.

So here the court should have dismissed the libel for the insurance premiums on the ground that they were paid for an insurance policy not "wholly maritime" in character. As the premiums are inseparably bound up in the other damages, no jurisdiction existed for the default.

In none of the three cases cited on the point at pp. 13, 14 and 15 of its brief, *Rosenthal v. The Louisiana, Keyser v. Steamship Co.* and *Nash v. Bohlen,* was the insurance to cover a joint land and water journey.

It may be well to comment again on the fact that as the question of the insurance is one of jurisdiction, it need not be raised by the assignments of error (p. 22, green brief).

VII.

Even if the Contracts Had Been for Marine Insurance Only, the Question Whether the Contract was to Insure or Merely to Procure Insurance Must be Resolved Against the Jurisdiction.

Counsel urges that the portions of the libel referring to the insurance may have meant that the California-Atlantic Steamship Company was to become the insurer instead of procuring policies from some insurance company. It is hardly likely that a separate premium would be paid the California-Atlantic Steamship Company for insurance when, as our opponent claims, they were already liable as insurers as common carriers.

However, if the libel is ambiguous on this point, the presumption in United States courts is that the court did not have jurisdiction and the ambiguity must be resolved in favor of the proposition that the contract was to procure insurance from other companies. This is a non-maritime contract. See authorities at pages 22 et seq. of green brief.

The case of *Rosenthal v. The Louisiana,* 37 Fed. 264, cited by our opponent, is clearly distinguishable. In that case the court finds jurisdiction solely on the ground that the contract was a single contract with the insurance agreement but one of its subordinate promises. In the case at bar, the insurance transaction was a separate one, for which premiums were paid, while the contract of affreightment had its own consideration in the form of freight. Besides the damage alleged in that case was not for breach of the contract to insure while here it was.

The case of *The Oceano,* 148 Fed. 131, is in no wise pertinent. It holds that an overpayment of freight moneys for a maritime carriage warrants a suit in admiralty. It certainly does not overrule those cases which hold that an agreement *to procure* insurance policies is not a maritime contract.

In *Nash v. Bohlen,* 167 Fed. 427, the court squarely says that even the contract to procure *marine* insurance is not by itself of maritime cognizance and becomes so only by virtue of its being bound up with the other stipulations of a charter party. Here the contracts are averred as separate, there is no interdependent consideration and the blending is only in the averment for damages on which the decree is based.

VIII.

The Amendment of the Libel Opens the Default. With the Default Opened, no Decree Could be Rendered in Respondent's Absence.

The decree is based on an amended libel, to which the respondent had no opportunity to plead.

There could be no plainer error—nor one having less need of assignment. One cannot read the decree without seeing it.

We have already cited many cases to the effect that a default only confirms what is properly pleaded. This point is entirely different. It is that the amendment of the libel *after* default *sets it aside,* and allows respondent an opportunity to answer it. There being no default, the court had no power, *without a trial,* to enter a judgment.

As is said by *Daniels' Chancery:*

> "The amendment of the bill, even for the purpose of rectifying a clerical error, renders a previous order to take the bill pro confesso inoperative"

unless the defendant is in contempt for not answering and notice of the motion to amend has been given personally to him.

Daniels' Chancery, §426;
Gibson v. Reese, 50 Ill. 383;
Harris v. Dietrich, 29 Mich. 306;
Albright v. Texas, 8 N. Mex. 422.

That an amendment which increases the amount for which the respondent is liable goes to the essence needs

no argument. A respondent may well say "I'll stand for so much but if it is for any more I'll defend." Many courts have held that such essential amendments reopen the default.

Thompson v. Johnson, 60 Cal. 292;
Witter v. Bachman, 117 Cal. 318;
Adkins v. Faulkner, 11 Ia. 326;
Cook v. Woodbury Co., 13 Ia. 21.

It is urged by counsel that the court should simply reverse the decree and award the amount originally prayed for. We submit that counsel comes too late. *He has already amended* his libel. The old libel on which the default was entered is no longer before the court. The amended one has taken its place. We have not had an opportunity to plead to it and we should be heard.

Respectfully submitted,

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